92-668

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

RE: PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS

FOR THE NINTH CIRCUIT

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QUESTIONS TO BE PRESENTED

1. Did the appellate court so far deviate from the usual and customary procedues in imposing harsh sanctions, so as to invoke the supervisory powers of the Supreme Court, in the following circumstances:

Where the appellate court reviews a bankruptcy trial court decision and reverses that decision, may the appellate court impose a sanction in excess of $5000 under Fed.R.App.P. 38 upon the party who prevailed before the bankruptcy trial court, absent any other act committed by the party seeking to sustain the bankruptcy court judgment?

2. If a party to an appeal files with the appellate court a motion in arrest of the appellate court judgment, and petition to be relieved from the appellate court judgment and argues in

that motion that the appellate court judgment was flawed because the appellate court lacked significant portions of the trial court record, may the appellate court impose a sanction of $2,500 under Fed. R. App. P.38 absent any other act upon the part of the party sanctioned?

3. Is the appellate court required under Amendment V of the CONSTITUTION OF THE UNITED STATES to give notice of intent to impose sanctions and to afford the person it sanctioned an opportunity to be heard upon the issue?

NAMES OF PARTIES TO THE PROCEEDING

The names of all parties to the original proceeding are contained in the caption of the case.

Erwin & Erwin, Professional Corporation, is a professional legal corporation licensed to practice in the State of Oregon. The two officers of the corporation and the two members of the Bar are Warde H. Erwin and Charles C. Erwin who are the duly licensed lawyers practicing law before all Oregon courts, both Federal, District, and Ninth Circuit. Warde H. Erwin has been admitted to the Supreme Court of the United States.

In view of the nature of the proceedings of the Court of Appeals, the plaintiff-appellee or her attorney may not be interested in this petition.

The Solicitor General may well be an interested party since the sanctions imposed are against officers of the

Federal Court Bars which involves application of Fed. R. Civ. P. and Fed. R. App. P., and the decision has substantial impact upon all members of the Bars of Federal Courts and is of great public interest in the maintenance of the integrity of the Federal Judicial system. U. S.C. 2403 (a) may be applicable, and the Solicitor General, Department of Justice, Washington, D.C. 2053 is being served.

The Ninth Circuit has not certified the constitutionality of Fed. R. App. P. 38, 11 U.S.C. 502, nor Rule Br. 8013. Only Fed. R. App. P. 38 is questioned as to constitutionality.

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7. Order of August 10, 1992, modifying Order of July 22, 1992, (not published) 24, 29,53,55,64

8. Order dated August 13, 1992, denying rehearing of the Order of March 24, 1992, and denying hearing en banc (not pubished) 25,57 58,63,68

JURISDICTION

Dates of entry of judgment for which review is sought by this petition:

1. Order of Ninth Circuit Court of Appeals dated March 24, 1992, levying sanction damages of $5058.75.

2. Order of Ninth Circuit Court panel, dated July 22, 1992, as modified by order dated July 28, 1992, and further modified by order dated August 10, 1992, and failing to submit "en banc" suggestion to the full court and denying hearing of Fed. R. Civ. P. 60 petition for relief from judgment of August 26, 1992.

3. Order of Ninth Circuit Court panel, dated August 13, 1992, denying rehearing of order dated March 24, 1992, and "en banc" suggestion.

CITATIONS TO CONSTITUTION, STATUTES, AND RULES

1. Amendment V, UNITED STATES CONSTITUTION (Appendix p. 268)
2. OREGON REVISED STATUTES, Professional Corporation) (Appendix p. 268-9)
3. FEDERAL RULES OF CIVIL PROCEDURE 68 (Appendix p. 273)
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6. FEDERAL RULES OF APPELLATE PROCEDURE 38 (Appendix p. 269)

STATEMENT OF THE CASE

Erwin & Erwin, Professional Corporation as attorneys for the bankrupt debtor, Marquam Investment Corporation, filed a claim for the reasonable value of those services in the United States bankruptcy court for the District of Oregon.

A creditor (plaintiff-appellee), holding, an unsecured punitive damage claim against the same debtor, opposed the claim on the theory that any services performed by Erwin & Erwin, P. C. in behalf of the bankrupt were intended to be a gift.

Hearings were held to determine the "intent" of then Erwin, Lamb & Erwin, Professional Corporation to furnish its legal services to the debtor as a gift. (Colin Lamb subsequently divested his interest in the corporation.) Testimony was presented, cross examination

provided, rebuttal testimony presented, and arguments held (See affidavit of Charles Robinowitz (Appendix p. 25- Appendix p. 26,) and transcript of proceedings of United States Bankruptcy Court (Judge Hess) entries dated 10-14-83 (App. p. 86) 11-18-83 (App. p. 88) Transcript file 2-23-84 (App. 90), 2-24-84 (App. p. 90), 1-28-85 (App. 95), 4-26-85 (App. p. 98), 5-2-85 (App. p. 99), 8-16-85 (App. p.106), 8-19-85 (App. p. 107),4-3-87 (App. p. 120), 5-28-87 (App. p. 121) 6-9-87 (App. p. 121).

The bankruptcy court determined that services were not intended by Erwin & Erwin, Professional Corporation to be gratuitous to the debtor (opinion of Judge Henry Hess (5-6-85, Tr. p. 194). (Appendix p.1). (Order Appendix p. 16)

The determination of the reasonable value of the services was postponed for a further hearing and determination.

Objector filed an interlocutory appeal to the District Court for the District of Oregon (Docket entry - District Court) (Appendix p. 100).

The District Court dismissed the appeal on the grounds that evidence to be introduced on "reasonable value" might have an effect on a determination of "intent to provide gratuitous services." (Appendix p. 26)

In February, 1986, the court and objector made request for a detailed claim, and the senior bankruptcy judge in April, 1986, required the document to be prepared; it was prepared and reduced to writing (65 pages) and was filed (Appellant's Brief p. 9, Appendix p. 214).

Hearings were scheduled and held May 18, 1987, May 26, 1987, June 5, 1987, June 16, 1987, consisting of over 20 hours of testimony,

exhibits, cross-examination, and rebuttal evidence (affidavit of Robinowitz in support of motion to sever appeal April 27, 1988) in behalf of appellant - objector) (Appendix p. 27).

(The Court of Appeals found that no such exhibit existed.) (Appendix p. 65)

The bankruptcy court allowed the claim as to reasonable value of the services and entered judgment. (Appendix p. 18)

Plaintiff-objector filed a notice of appeal to the District Court for the District of Oregon on April 4, 1988, (Transmittal of record-item three, dated 4-4-88) and on April 28, 1988, a motion to sever issues, and to determine on appeal only the bankruptcy court's order which determined that Erwin & Erwin, P.C. did not intend to perform the services as a gift (U.S. District Court, Item 11 - transcript of record on appeal).

(Appendix p. 186)

The motion to sever was allowed, and the record was ordered to be limited to the issue requested (District Court minutes 6-1-88) (Appendix p.157) (Appendix p. 31).

The "reasonable" value of services was not appealed.

The excerpt of record on appeal was filed by Brewer on June 22, 1989, (Dist. Ct. Transmittal of record, Item 22 and Item 35). (Appendix p. 196)

On March 8, 1990, without notice, argument, or hearing the District Court entered an Order reversing the Bankruptcy Court order allowing the claim of Erwin & Erwin (District Court docket, Item 46) (Appendix p. 164) (Appellant's brief p. 6) (Appendix p. 211) (Order Appendix p. 33) (Opinion App. p. 59).

On April 5, 1990, Erwin & Erwin, P. C. filed a Notice of Appeal from the

order of March 8, 1990, to the Ninth Circuit Court of Appeals and designated the record in the District Court. The record was transmitted on April 24, 1990, as the record on appeal, and filed on April 24, 1990. (Transmittal of Record 192) (Appendix p. 198).

On September 17, 1990, Brewer filed supplemental excerpts of record and moved to file oversized excerpts permitting consideration by the appellate court of matters outside of the record. Brewer requested that the Ninth Circuit take judicial notice of the extra judicial statements (Ninth Circuit Docket Sheet 10-5-90 and 10-15-90) (Appendix p. 176-177).

The motion of Brewer to consider matters outside of the record was denied on August 26, 1991. (Appendix p. 60)

The motion to file oversized excerpts was denied on September 28, 1990 (Appendix p. 177).

The request to take judicial notice of matters outside the record was denied by the appellate court but also directed Brewer to file a judicial notice request to the appellate tribunal when that tribunal had been determined. (Appendix p. 177) (Docket entry 10-5-90).

On October 15, 1990, Brewer filed supplemental excerpts of record on appeal and request for judicial notice per order of September 28, 1990, (Ninth Circuit Docket 10-15-90) (Appendix p. 177) of matters outside the record and not offered nor considered by the bankruptcy court.

On August 26, 1991, the Ninth Circuit panel affirmed the District Court's reversal of the bankruptcy court on a "de novo" theory that concedes that the

District Court may have been in error in considering matters outside of the record but held it was not important since it was ignoring the District Court's decision in its entirety. (945 F.2d 1462) (9th Cir.1991) (Appendix p. 44-59).

Appellee (objector and appellant below, Brewer) filed a motion to allow attorney's fees on September 23, 1991. (Ninth Circuit). (Appendix p. 184) Erwin & Erwin opposed the motion on 10-3-91 (Ninth Cir. Docket 10-3-91).

On December 13, 1991, the Ninth Circuit court's mandate was issued with costs to appellee. It allowed only single costs. This should have determined entitlement to sanctions.

On March 24, 1992, the Ninth Circuit issued an Order levying a $5058.75 damage sanction against Erwin & Erwin, P.C. for filing a frivolous appeal from the District Court's reversal of the

bankruptcy court's order which allowed the claim for prepetition services provided to the bankrupt (Appendix p. 61). (Appendix p. 184)

The presiding judge of the Ninth Circuit panel filed a dissenting opinion (Ninth Circuit Docket 3-24-92). (Appendix 66).

On April 7, 1992, Erwin & Erwin, P. C. filed a petition for rehearing with suggestion for "en banc" determination. (Appendix p.185) (Docket 9th Cir. 4-7-92)

. On April 9, 1992, Erwin & Erwin, P.C. moved to file excerpts to accompany the motion for rehearing and "en banc" suggestion. (9th Cir. Docket 4-9-92) On April 29, 1992, Erwin & Erwin, P. C. filed a Fed. R. Civ. P. 60 petition for relief from the judgment dated 8-26-91, with suggestion for "en banc" hearing. (Appendix 185) (9th Cir. Docket 4-29-

92). This motion was distributed to the panel - no distribution was made to the "en banc" court as indicated by the Ninth Circuit docket per the docket entries.

Additional authorities in support of the petition for Fed. R. Civ. P. 60 relief were shelved and not distributed to the members of the court pending the determination of a motion to recall the mandate (Appendix p.185 (Ninth Circuit Docket 4/29/92). It also was NEVER distributed to the en banc court.

The motion to permit filing an excerpt to accompany the motion for rehearing of the sanction order of March 24, 1992, was granted on July 22, 1992. (Appendix p. 74)

On July 22, 1992, the Ninth Circuit panel entered an order denying the petition for Fed. R.Civ.P. 60 relief and levying an "additional" $2500 sanction payable to the clerk (Appendix p. 72).

No action on the "en banc" suggestion was taken.

On July 28, 1992, the order of July 22, 1992, was mysteriously ordered vacated as to the sanction. (Appendix p. 74)

On August 5, 1992, the excerpts in support of rehearing were filed and distributed (Ninth Circuit Docket 8-5-92). (Appendix p.187) (The excerpt consisted of a copy of the Court of Appeals opinion of August 26, 1991, denying the claim for services, a copy of the District Court order severing the appeal and limiting the record, and a copy of the Order of the Ninth Circuit Court of March 24, 1992, levying the sanction.

On August 10, 1992, a new sanction order duplicating the July 22, 1992, order was entered. This deleted accrual of interest on the $2500 sanction and

deleted the place or person to whom the added sanction was to be paid. (Appendix p. 76)

On August 13, 1992, the Ninth Circuit entered an order denying the petition for rehearing of the March 24, 1992, order and recommending against "en banc" hearing and denying the request. The order further recited that the full court has been advised of the recommendation and that no judge had requested a rehearing en banc. (Appendix p. 78).

ARGUMENT

VALIDITY OF ORDERS IMPOSING SANCTIONS

There are two orders for which review is sought, the determination of which may terminate or have a tendency to terminate the request for examination of procedures of the Ninth Circuit Court of Appeals.

THE ORDER OF MARCH 24, 1992

This order levied a devastating award of $5058.75 judgment against Erwin & Erwin, P. C. as a claimant in the bankruptcy of Marquam Investment Corporation. Since the claim was for legal services rendered to a bankrupt, and since a professional legal corporation may provide services only by lawyers, licensed under Oregon law, the sanction was automatically imposed upon Warde H. Erwin and Charles C. Erwin, who are both officers of the Federal Courts. (ORS 58.075; ORS 58.155) (Appendix p. 268-269)

The levy was stated to have been made under authority of Fed. R. App. P. 38 based upon the appeal from the District Court of the District of Oregon which reversed an order of the United States Bankruptcy Court for the District

of Oregon which had allowed the claim of Erwin & Erwin, P. C.

Two of the three Court of Appeals judges stated that the appeal was frivolous.

If the Court of Appeals had no authority to levy the sanction, it might not be necessary to proceed to determine whether or not the appeal was frivolous, although the court might wish to examine the procedure adopted by the U. S. District Court as approved by and as unilaterally, initiated by the Court of Appeals in reversing the Order of the bankruptcy court.

Erwin & Erwin, P.C. was the "appellee" in the District Court (for purposes of Rule 38) and not the "appellant."

The Court of Appeals correctly realligned the parties when it determined to decide the case "de novo" on the

bankruptcy court record (see order of August 26, 1991, p. 11805) (Appendix p. 50),

The reallignment was again repeated verbatim in the dissent of Judge Alarcon to the order of March 24, 1992 (p. 2860 as analyzed p. 2859) which levied the devastating sanction. (Appendix p. 70)

Rule Fed. R. App. P. 38 authorizes sanctions only against appellants taking frivolous appeals. (Appendix p. 269)

Erwin & Erwin, P. C. was not an appellant for the purpose of Fed. R. App. P. 38, and the sanction levied by the order of March 24, 1992, was improper and probably void (both constitutionally and legislatively).

The order of March 24, 1992, should be reversed.

THE ORDER OF JULY 22, 1992 AS MODIFIED BY ORDER OF JULY 28, 1992 AND FURTHER MODIFIED BY ORDER OF AUGUST 10, 1992

Two of these orders levied an "additional" $2500 sanction against Erwin & Erwin, P. C. (July 22, 1992, and August 10, 1992). (Appendix p. 72476)

The order of July 28, 1992, vacated the sanction of $2500 in its entirety as levied by the July 22, 1992 order. (Appendix p. 74)

On August 10, 1992, the Ninth Circuit issued the new order without any reference to any previous order. (Appendix p. 76)

The August 10, 1992 order repeated the denial of Erwin & Erwin, P. C.'s motion for Fed. R. Civ. P. 60 relief from the judgment of August 26, 1991, and repeated the $2500 sanction. (Appendix p. 276)

However, it eliminated the interest factor contained in the July 22, 1992 order and removed the requirements of payment to the clerk leaving the August

10, 1992, order silent as to whom it was to be paid.

Neither the July 22, 1992, nor the August 10, 1992, order ascribed any reason for the sanction except that it was levied under Fed. R. App. P. 38.

Since it was not a damage award to Brewer, she not having participated in nor appeared as to the motion for Fed. R. Civ. P. 60 relief, we can only assume that the sanction was assessed because Erwin & Erwin, P. C. had the temerity to seek relief from what now appears to have been a void judgment entered by the Court of Appeals on August 26, 1991, said judgment being based upon a record which it did not have before it and which it did not examine.

Fed. R. App. P. 38 does not authorize any such sanction for requesting Rule 60 relief from an improper and probably void judgment (see petition for

Rule 60 relief separate submittal "B") Fed. R. App. P. 38 applies only to appeals and not to motions for relief.

The elimination of that portion of the July 22, 1992, order which directed that payment be made to the Clerk of the court is puzzling. Particularly this is true because it labels the sanction to be a "further" sanction but does not award damages (of which, of course, there could be none). "Damages" or "single or double costs" to an appellee are the only type of sanctions authorized by Fed. R. App. P. 38.

Both sanctions here are without authority and should be reversed. They were improper legally, as well as procedurally.

If either were allowed to stand, the constitutionally prevented taking of property without due or ANY hearing or procedure or process of law would be

brought into play under Amendment V of the United States Constitution. The disastrous consequence of allowing the Ninth Circuit to sanction the mere resisting of an appeal of a favorable factual determination, involving the duties of officers of the court, would have an explosive impact on the entire Federal Judicial system and Bar, as Judge Alarcon wrote in his dissent to the March 24, 1992, order (p. 2860) (Appendix p. 66).

If this court does not grant certiorari, counsel are placed in the dilemna of facing sanctions or committing malpractice.

Judicial immunity does not authorize the unauthorized taking of property without process of law by anyone including judicial officers or the Congress of the United States.

If Fed. R. App. P. 38 were construed to authorize such unlimited action for an undefined "sin," it would clearly be unconstitutional and void.

WAS THE APPEAL FROM THE DISTRICT COURT FRIVOLOUS?

Not knowing whether or not this court will grant this writ on the above-cited grounds, it is necessary or at least advisable to discuss the procedure adopted by the Court of Appeals to determine its finding (without any hearing) that the appeal from the District Court's reversal of the bankruptcy court's order allowing Erwin & Erwin's claim for services was frivolous so as to invite the sanction levied by the Order of March 24, 1992.

It will also be necessary to determine the procedure adopted by the Court of Appeals in levying a "further" sanction, apparently for filing a motion

for relief from the original judgment of the Court of Appeals which independently (and also without hearing) determined to reverse by a de novo trial the bankruptcy court by a de novo order which allowed the claim of Erwin & Erwin, P.C. against the bankrupt debtor (Opinion of August 26, 1992, 942 F.2d 1462, (9th Cir. 1991) Slip Opinion, pgs. 11799-11809). (Appendix p. 38).

DISCUSSION OF THE ORDER OF MARCH 24, 1992, AS TO FRIVOLOUSNESS:

By Oregon law, a professional corporation must operate only by and through its shareholders who are themselves licensed to render such services. (Appendix p. 268-269)

The effect of the sanction therefore should be examined as to its effect on the judicial system when its officers are sanctioned without cause and for exercising only the duties entrusted to

them, as such, and as authorized by the laws of the United States of America in the administration of the Federal Judicial system. (Appendix p. 69-71)

The reason given for the sanction of March 24, 1992, ($5058.75) was that Erwin & Erwin, P. C. appealed an adverse judgment of the District Court of the State of Oregon. The Ninth Circuit labelled that appeal as "frivolous" in a special order seven months after its opinion of August 26, 1991.

The peculiarity of that Order and the lack of precedent for such an action is a false application of Fed. R. App. P. 38.

There is only one reason given for the Ninth Circuit's action of March 24, 1992. (Order Appendix p. 66)

The Ninth Circuit panel reasoned that Erwin & Erwin, P.C. should have known and realized that the favorable

decision of the bankruptcy judge allowing Erwin & Erwin, P. C.'s claim for services provided to a bankrupt (Marquam Investment Corporation) would later (17 months later) (3-8-90 - Appendix p. 164 to August 26, 1991 - Appendix p. 35) be characterized by the Court of Appeals as flawed by lack of reason, adopted a flawed syllogism. It imputes the foresight to the party successful at trial on a factual "intent" question that the senior bankruptcy judge was so devoid of knowledge and application of the simplest of principles of contract law that Erwin & Erwin, P. C. should have realized that the decision of the bankruptcy court would be reversed by the District Court, that an appeal of the District Court's reversal would thereafter be deemed to be frivolous, and would result in punishment under Fed. R. App. P. 38 by a damage award levied as

punishment by the appellate Ninth Circuit. Yet, the Ninth Circuit found the District Court erred in considering a multitude of items outside of the record. Strangely, the entire appeal from the District Court (which the Court of Appeals held was frivolous by its order of March 24, 1992) had been disregarded and discarded by the appellate court in its opinion of August 26, 1991. The Court of Appeals entered what was characterized as a "de novo" opinion, not authorized, briefed, or argued by anyone.

The authority under which the sanction was levied states: (Appendix p. 269)

No suggestion was made that Erwin & Erwin, P. C. did anything or intended to do anything to delay, defraud, hinder, or obstruct judicial procedure by appealing the District Court's reversal of the

bankruptcy court's decision allowing its claim.

We are including in the Appendix (p. 199) a copy of the brief of Erwin & Erwin, P. C. in support of the appeal in order that this court may determine whether or not the appeal was "frivolous" or for some purpose other than a bona fide claim of error with which the Court of Appeals agreed, arguendo (p. 11808 Opinion of August 26, 1991). (Appendix p.59)

As far as the Ninth Circuit was concerned, whether or not the appeal had substance was of no consequence since it determined that it would ignore the appeal and the District Court's decision from which the appeal was taken completely and in its entirety and as though it did not exist.

The sanction, so far as we can tell, was not levied based upon an examination

of the "validity" or substance of the appeal because that entire proceeding had completely been discarded by the Ninth Circuit panel.

It is therefore ascertainable that when it made its decision for sanctions, it did so on some other basis.

But what was that basis?

The basis was (ignoring the mandate of Br. 8013, that factual determinations are not to be disturbed on appeal) that the senior judge of the bankruptcy court for the District of Oregon although enjoying a reputation for integrity, perspecuity, ability, years of experience, and the confidence of the members of the Federal Bar was, in the opinion of the three judges of the Ninth Circuit completely lacking in logic, knowledge of the basic principles of contract law, and guilty of flawed reasoning to the point that his decision

was so lacking in merit that the claimant should have known that his decision would be reversed and therefore should not have appealed.

One would have thought that it would have occurred to the panel that something was wrong when a judge of the stature of Judge Hess would enter a judgment allowing a claim without any basis in logic, without reason, and without supporting evidence and without knowledge of contract law.

However, the error was not that of Judge Hess, was not that of Erwin & Erwin, P. C., but was the product of an erroneous decision of the U. S. District Court for the District of Oregon, in relying upon and sua sponte embellishing the record of the bankruptcy court by accepting unsupported statements of counsel, relying on information, the source of which to this day becomes

undiscoverable, and much of which the bankruptcy court had not ever considered, nor seen, was not offered, nor received and was not designated as the record on appeal by Brewer on her appeal from the bankruptcy court to the District Court as required by appellate procedure.

All of this was done without notice or hearing of any sort or kind.

The error was compounded by the Ninth Circuit panel abandoning the limited scope of the issue presented to and ordered by the District Court; namely, "intent of the attorneys for a bankrupt debtor to provide gratuitous services to a bankrupt corporation," and in considering the entire claim, (not just the single issue presented to the bankruptcy court) as though the claim was being reviewed directly, and in its entirety as a <u>trial</u> de novo.

The District Court in its opinion frankly admitted that it was considering matters outside of the record of the bankruptcy court.

It stated:

> "The bankruptcy court's rulings are certainly understandable because of the protracted hearings on this claim."

But then the District Court admitted its improper conduct in considering statements from counsel's brief as evidence and went on to state: (Appendix 228 et seq.) (Appellant's Brief)

> "Although the bankruptcy court held evidentiary hearings in 1985, it did not have the opportunity TO CONSIDER LATER DEVELOPMENTS."

(Emphasis ours)

Consideration of "so called later developments" not considered by the trial court is absolutely prohibited to an

appellate court sitting in review of a trial court's decision (See Bankruptcy Rule 8013).

The bankruptcy court had followed the mandate of the claims statutes, 11 U.S.C. 502, and correctly applied the law. It should not have been faulted or ridiculed for so doing.

Erwin & Erwin, P.C. had no choice but to appeal to the Ninth Circuit as a complete deviation from the usual and customary procedures, but also directly contrary to the authority of a reviewing court as limited by BR. 8013.

The Ninth Circuit panel examined the case, based upon what it said was a complete bankruptcy court record. It was not. It determined that the record which it had before it, and which it examined, was so limited and unpersuasive that the panel could not understand how the bankruptcy judge could have allowed the

claim. (But, in its order of August 26, 1991, it was the bankruptcy judge that it vilified and not Erwin & Erwin, P. C.).

The Ninth Circuit panel did several things:

It determined that the claim of Erwin, Lamb & Erwin, P.C. was based upon a contract negotiated between Erwin, Lamb & Erwin, P. C. and an officer of the bankrupt acting in behalf of the Marquam Investment Corporation as the debtor to provide the legal services for which a claim was made.

The contract theory was spawned in the mind of the Court of Appeals.

This was a completely erroneous assumption. It was not contended by anyone, not briefed and not argued by anyone, nor was contract law even an element of the claim.

Why it was discussed in the so called "de novo" review articulated by

the August 26, 1991, decision is not ascertainable.

The right to recover for services performed by an "insider" (bankruptcy term), or by an "attorney for the debtor" is required by law (if contested) to be allowed by the bankruptcy court, but only to the extent of the "reasonable value" (not contract value) of the services actually performed in behalf of the bankrupt.

The concept of quasi contract or quantum meruit recovery is so fundamental and familiar in bankruptcy matters that it is codified in 11 U.S.C. 502 (b) (4). (Appendix p. 270). This statute, in the case of services of "insiders" and "attorneys for a debtor" requires the bankruptcy judge to ignore any contractual basis in his examination of such claims. The statute mandates that the court is to examine claims for

services and disallow that portion which exceeds the reasonable value of such services. No other case finding disallowance as a gift, including actual out-of-pocket dollars advanced for a client/debtor has been located.

It is fundamental law that when a person peforms services at the request of another, the law will presume an intent to pay for those services to the extent of the reasonable value thereof.

No contention was made by Brewer, within the scope of the record reviewed here, save the charge of donative intent upon the part of the appellant. She did not charge that the claim was not based upon services actually performed nor the reasonable value was excessive or was not enforceable against the debtor, either under any other "applicable law, or because of an agreement." (11 U.S.C. 502 (b) (1))

The adoption of a rule requiring a formal written contract to support a claim for services actually rendered to a debtor bankrupt is the product of an erroneous unilateral aberration of the Ninth Circuit panel and is directly contrary to statutory law. (See appellant's Petition for rehearing of order of March 24, 1992 p. 12).
(Separate submittal "A")

The bankruptcy judge followed the statutory mandate, held hearings, required written proof of each of the services rendered, dates, and values, and ordered it served on the objector who cross-examined witnesses, and introduced what she considered to be rebuttal testimony. (District Court record on appeal) (Appendix p. 219)

The document prepared by claimant in response to the direction of the bankruptcy judge consisted of 65 pages,

including court registers, showing the multitude of delay motions filed by Brewer on what should have been a simple F.E.D. case, in support of which there was countless hours of testimony, (20 hours admitted by Brewer's attorney) (affidavit in support of motion to sever) (Appendix p. 27) also see appellant's brief, footnote one, page 12) (Appendix p. 217). The F.E.D. case ended favorably for Marquam after a full trial.

Although the Ninth Circuit panel decision (August 26, 1991) was erroneous in that because while it stated that it was examining the bankruptcy court's decision allowing the claim of Erwin & Erwin, P.C. based upon the bankruptcy court records, that statement was false. It did not have the bankruptcy court record before it to examine "de novo" although it may have thought the bankruptcy court record was

before it. It had only that portion of the bankruptcy court record forwarded to it by the District Court from which the majority had been excised by order of the District Court.

While the appellate panel recognized that the District Court had accepted as fact matters which were not in the record and stated that it was not important since they were ignoring the District Court's opinion, they nevertheless repeated the District Court error by themselves, reciting as fact and history, extra judicial statements which could have only come from the request to take judicial notice of matters outside of the record (see record for rehearing p.132, Appendix p. 229, et seq).

An example:

The panel noted that there was no written evidence of services performed. In the bankruptcy records reposed a 65-

page detailed exhibit supported by court records of each of the services performed. (Appendix p. 48)

But it was seven months after its August 27, 1991, decision that it apparently determined (for some undisclosed reason) to examine the question of sanctions.

On March 24, 1992, the Ninth Circuit panel suddenly decided upon a sanction or punishment, but for what reason? The appeal had been totally disregarded, and it had entered on August 26, 1991, a "de novo" opinion.

It stated that it was awarding a damage sanction under Fed. R. App. P. 38 as a result of taking a frivolous appeal, but the reason given was not anything Erwin & Erwin, P. C. had done, but was based upon the fact that Erwin & Erwin, P.C. should have known of the incompetency of the bankruptcy judge when

he allowed Erwin & Erwin's claim and therefore should not have questioned the District Court's reversal no matter how erroneous.

For having the temerity to appeal Erwin & Erwin, P. C. was slapped with a thunder-striking $5058.75 judgment in favor of the party that lost the decision in the trial court.

Erwin & Erwin, P. C. claims that this procedures was so unusual and so bizarre as to call into play the supervisory powers of the Supreme Court.

The importance of this decision to the Federal judicial administration is very compelling. If the sanction is allowed to stand, no officer of the Federal Court would dare appeal a District Court decision for fear that if the appellate court reversed the trial court, the lawyer (although an officer of the court and an integral element of

Federal Legal Jurisprudence), the lawyer would be sanctioned and would therefore hesitate to vigorously assert and defend his client's rights accorded by the laws of the United States.

(See Dissent of Judge Alarcon- Order of March 24, 1992) (Appendix p. 66)

THE ADDITIONAL $2500 SANCTION

The judgment order of July 22, 1992, levying an additional sanction in the amount of $2500 was levied by an Order which denied Erwin & Erwin, P.C.'s petition for relief under Fed. R. Civ. P. 60 (copy of petition separately submitted as submittal "B" for the court's information).

There is no explanation given of the reason for the levying of the sanction. (Appendix p. 72 and p. 76).

As a matter of fact it is not known for certain whether or not it has been assessed since it was vacated by an Order

of July 28, 1992 but reassessed by the Order of August 10, 1992.

Following the imposition of the original sanction order of March 24, 1992, Erwin & Erwin, P. C. filed a motion for rehearing and a suggestion for "en banc" hearing. (Submittal "A")

Because the sanction was based upon the taking of the appeal from the District Court decision and upon the Ninth Circuit Court's affirmance of the District Court, which had in turn reversed the determination of the bankruptcy court allowing the claim of Erwin & Erwin, P. C., it was determined that not only the $5038.75 sanction levied on March 24, 1992, should be reviewed by rehearing but that in order to determine whether the appeal upon which the sanction was based was frivolous, it was necessary that the court's attention be drawn to the actions

of the Court of Appeals in entering its decision on August 26, 1991, affirming the District Court. A petition for relief from that judgment was thought to be appropriate since that judgment appeared to have been void because not entered in reliance on a complete record (mistake of the appellate court).

It was felt that there was clear error and that the purpose of Fed. R. Civ. P. 60 where a "de novo" trial for relief from judgment was based on the court's own mistake and was not only appropriate but was exactly what Rule 60 was intended to accomplish. (Rule 60 verbatim Appendix p. 273)

FAILURE TO FOLLOW EN BANC PROCEDURES

The Court of Appeals failed to follow the procedures as set forth by Fed. R. App. P. 35 and the advisory notes adopted by the Ninth Circuit as usual and customary procedure.

In this case, the Motion for Relief from the August 26, 1991, Order affirming the District Court under Fed. R. Civ. P. 60 with "en banc" suggestion were not distributed at all (see Docket entries); no recommendations were made by the panel to the court, and no 21-day time lapse was therefore allowed. (See Advisory notes as to Fed. R. App. p. 35-4 adopted by the Ninth Circuit. (Appendix p.271)

In the case of the motion for rehearing with "en banc" suggestion, the petitions were distributed to the court by the clerk (Appendix p. 185). The bankruptcy excerpts were refused by the Clerk (at date of filing), and a motion for leave to distribute the excerpts was filed promptly, but not allowed until July 22, 1992, and not filed until August 5, 1992, (Wednesday).

Monday, August 10, 1992, (the same date as the new amended order denying the

Fed. R. Civ. P. 60 relief was entered) would have reasonably been the first date a considered recommendation to the full court could have been made if the excerpts were to be considered by the full court.

The order denying rehearing and denying en banc hearing was filed August 13, 1992, and that is the only document which could conceivably be construed as a recommendation against "en banc" hearing as provided by the advisory committee proceeding adopted by the Ninth Circuit (Appendix p. 27).

Presumptively, it would have been drafted earlier --say August 11 or 12, 1992.

The order states that the full court was notified of the panel's unanimous decision to recommend that "en banc" hearing be denied.

Before the excerpts could possibly have been considered?

On August 9 or 10, 1992?

By telephone? By writing?

If by writing, a docket entry would have been made showing distribution. There is none.

The order of August 13, 1992, states that no member of the court requested a vote. How could that be if the full court had received no recommendation until August 13, 1992?

The advisory committee notes (adopted by the Ninth Circuit states (Appendix p. 271)

The Court of Appeals panel apparently decided to act within hours of its decision to recommend denial of the petition as well as recommend denial of the suggestion for en banc hearing. Instead of awaiting the 21-day period,

the panel entered its final order on August 13, 1992.

Usual and customary procedure would be for the three-judge panel to have distributed in writing its recommendation against "en banc" hearing, awaited the 21 days to allow for consideration by the full court, and thereafter entered a final Order if no request was made by a member of the court for "en banc" review.

The precipitous action of the panel apparently was intended to prevent consideration of either petition by the "en banc" court.

Unless corrected, the procedure will be approved by this court.

Later cases decided by the Ninth Circuit have rejected the imposition of sanctions even where an appeal was frivolous but never where an appeal from a favorable trial court decision is taken to a Circuit Court from a District Court

or Bankruptcy Appellate Panel decision which reversed a bankruptcy court's factual determination.

Citations as shown by A.L.R., later case service, 67 A.L.R. Fed. 319-349 (Ninth Circuit) which reject requests for sanctions are:

Kehr v. Smith, Barney, Harris, Upham & Co. (1984, CA 9 Cal.,) 736 F.2d 1283, CCH Fed. Secur. L. Rep. p. 91547, 39 FR. Ser. 2d 924;

Unt v Aerospace Corp. (1985 CA9 Cal.) 765 F.2d 1440, 38 BNA FEP Cas 999, 37 CCH. EPD.P. 35427, 2 FR Serv. 3d 524;

RRX Industries, Inc. v. Lab-Con., Inc. (1985, CA9 Cal. 772 F.2d 543, 41 UCCRS. 1561;

Tomer v. Gates, (1987, CA9 Cal.) 811 F.2d 1240;

Caldwell v. Puget Sound Electrical Apprenticeship & Training Trust, (1987),

CA 9 WAsh.) 824 F.2d 765, 44 BNA. FEP. Cas. 907, 43 CCH. EPD P. 37295;

Hanna Boys Center v. Miller, (1988 CA 9 Cal.) 853 F.2d 682, 129 BNA. LRRM. 2082, 109 CCH. LCP. 10647;

Bulgo v Munoz, (1988, CA9 Hawaii) 853 F.2d 710;

Leidholdt v. L.F.P. Inc., (1988, CA9 Cal.) 860 F.2d 890, 15 Media L.R. 2201, cert den. (US) 103 L.Ed. 2d 837, 109 S. Ct. 1532;

Mackey v. Pioneer Nat. Bank, (1989, CA9 Wash.) 867 F.2d 520, 13 FR. Serv. 3rd 638.

Sheet Metal Workers Int'l Assn. Local No. 162 v. Jason Mfg. Inc., (1990, CA9 Cal.) 900 F.2d 1392, 134 BNA. LARRM. 2097, 115 CCH. LCP. 10003.

In the case of Tomer v. Gates, (1987, CA9, Cal.) 811 F.2d 1240, the court stated:

"Attorneys' failure to withdraw the demand (for sanctions) was unbecoming a member of the Bar of the court."

When an "en banc" hearing of the Rule 60 motions for relief from the judgment of August 26, 1991, was requested, the docket of the Ninth Circuit court discloses that the "en banc" petitions were never circulated to the court as required by the procedures of Fed. R. App. P. 35 (b),and no order denying "en banc" hearing appears to have been entered (See Ninth Circuit Docket, Appendix 169-189.

The only order respecting that petition for Fed. R. Civ. P. 60 relief is the Order denying the petition and directing an additional sanction of $2500.

On August 13, 1992, an order denying the petition for rehearing of the March

24, 1992, order was denied, and a hearing en banc was rejected.

THE CONSTITUTIONAL QUESTION

Closely allied with a motion for relief from a a void judgment or an improper judgment is the question of when, if ever, does such a judgment or sanction constitute an impermissible taking of property without due process of law contrary to constitutional amendment.

Amendment V provides as applicable (Appendix p. 268)

Does Fed. R. App. P. 38 violate Amendment V of the U. S. Constitution?

That Rule is entitled "Damages for Delay," but provides for the award of damages to an "appellee" if an appeal is determined to be frivolous.

The rule does not define "frivolous," but we assume the rule was intended to prevent appeals intended to vex, annoy, harass, or delay an appellee

without any reasonable basis for so doing.

But is there a point where an award of sanctions results in an impermissible "taking" of an attorney or client's property.

If the sanction is lifted or vacated by this court, because not authorized by Fed. R. App. P. 38, the constitutional provisions would not come into play.

If, however, the sanctions against Erwin & Erwin, P. C. are held to be authorized, damages awarded to Brewer who is the appellant in her District Court appeal, but nominal appellee in the appeal to the Ninth Circuit, calls for a determination of the question: "Does such a sanction without hearing constitute a taking of property without due process of law"?

The authority of the appellate court under Fed. R. App. P. 38 by its language

is unlimited in scope and without procedural restraints or guidance (short of the court's general inherent powers)

If the court should look with disfavor at a party or an attorney and awards a devastating sanction under the guise of some procedure which the court states (without any basis in fact) has been undertaken frivolously, has the constitutional provision been violated?

The arbitrary award of damages to the appellee for a frivolous appeal does not constitute the taking of property for a public purpose, (Article V), but the awarding of a sanction with directions to pay the amount to the Clerk of the court may well constitute a public taking. However, the subsequent order of August 10, 1992, omits the direction to make payment to the Clerk of the Court and directs payment to no one.

Such an award, however, is not permitted at all under Fed. R. App. P. 38 because it is not an award of single or double costs or damages, and no other award is permitted under that rule.

To award sanctions without authority would violate the constitutional provision of the Constitution of the United States of America.

The Ninth Circuit therefore has so far departed from the usual and accepted standards of procedure as to invoke the supervisory powers of the Supreme Court.

The remedy here appears to be a direct appeal or petition for certiorai where the action of a Federal Judge or panel is so lacking in substance and authority as to constitute an impermissive taking or a punishment without trial or hearing. If "appeal" was available for redress, it would eliminate the question of due process.

The functioning of the entire Federal Judicial system is jeopardized by the chilling effect upon officers of the court performing necessary services both to the courts and litigants when an unlimited and irresponsible damage award is made without even minimal constitutional protection and without hearing or basis.

QUESTION OF FIRST IMPRESSION

Judge Alarcon in his dissent from the Order of March 24,1992, stated (p. 2859) (Appendix p. 66)

The dissent distinguishes the case of McConnell v. Critchlow, 661 F. 2d 116 (9th Cir. 1981), relied upon by the majority.

This, therefore, is a matter of first impression and adopts a new and novel and highly controversial procedure unintended and unsupported by any authority, devoid of logic, and calling

into play the CONSTITUTION OF THE UNITED STATES OF AMERICA, and the law prohibiting the deprivation of civil rights of lawyers representing clients.

CONCLUSION

This petition's allegations are all based upon matters of record and are therefore uncontrovertible physical facts.

Petitioner therefore requests that the following actions and findings be considered by the court:

1. The order of the March 24, 1992, awarding sanction damages in the amount of $5058.75 is reversed, and the Order is vacated;

2. The orders of July 22, 1992, and August 10, 1992, are reversed and vacated.

3. The petition under Rule 60 Federal Rules of Civil Procedure is allowed. The judgment opinion of August

26, 1991, is arrested, and the opinion is vacated; the mandate is recalled.

4. The order of July 28, 1992, vacating the sanction order of July 22, 1992, is affirmed;

5. The order of August 13, 1992, denying the petition for rehearing of the March 24, 1992, order is moot.

6. The decision of the United States District Court is reversed, and the order of the bankruptcy court is affirmed.

The foregoing action is based upon the following propositions of law:

1. The sanction levied by the Order of March 24, 1992, is not authorized under Rule 38 Federal Rules of Civil Procedure. When the parties are properly realligned, Brewer is an "appellant," and Rule 38 allows damage sanctions only by award to an "appellee."

Without reallignment, the award of damages was improper in any event because

the District Court appeal to the Ninth Circuit was not frivolous as a matter of law but was taken in good faith and was meritorious.

Sanctions are not permissible on the theory that the trial judge's decision allowing the claim of Erwin & Erwin, Professional Corporation was so improper that the District Court's reversal should not have been appealed and was therefore frivolous.

2. The opinion of the court 942 F.2d 1462, is void because the Court of Appeals relied upon only a portion of the bankruptcy court record which was before it, a major portion of which had been excised by the Order of the District Court.

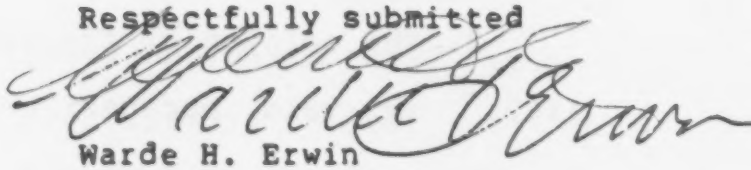
An appellate court reviewing an Order of the bankruptcy court "de novo" must rely on the same record as was presented to the bankruptcy judge.

The motion for relief from a void order under Rule 60 Federal Rules of Civil Procedure was proper and should have been allowed.

The United States District Court order reversing the bankruptcy court was void for failure to follow Bankruptcy Rule 8013 and 11 U.S.C. 502.

The constitutional question is not reached.

Respectfully submitted



Warde H. Erwin

October 10 1992

EDITOR'S NOTE

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92-668

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

APPENDIX TO PETITION FOR CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

VOLUME I

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RE: PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,
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vs.

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Defendant-appellant.

ORAL OPINION OF

HONORABLE HENRY L. HESS,

UNITED STATES BANKRUPTCY JUDGE,

April 6, 1985

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THE HONORABLE HENRY L. HESS

April 6, 1985

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OPINION OF

THE HONORABLE L. HENRY

April 6, 1985

THE COURT: Well, we have to remember that the issue in this case is whether the legal services rendered by the professional corporation for Marquam Investment were intended to be -- were intended by the Marquam Investment and by the professional corporation to be compensated when funds became available or were intended to be performed without compensation. That is the issue that we are facing now.

We are not concerned with any conduct on the part of Marquam or the professional corporation which might call for equitable subordination of the claim of the professional corporation. Again, we are not -- we are also not concerned with whether the proof of claim represents a reasonable sum for the services

that were performed. The sole issue is whether or not it was intended that these services be paid for or whether they were donated.

There is some evidence that would indicate a lack of an intent that the services be compensated. No billing was every submitted by Marquam to the professional corporation or by the professional corporation. Neither the books of Marquam nor the professional corporation reflect an accounts receivable from the -- or owing to the professional corporation or an accounts payable by Marquam. In the action brought to avoid the conveyance by Marquam to Squaw Creek Construction, no mention was made of attorney's fees owing. I might say, I'm only presenting the argument on one side, not presenting the counter-argument in regard to these matters.

An account payable was not shown on

the balance sheet of Marquam. It was indicated that it would not have been a good tax move for Marquam to have paid to -- or not a good tax move so far as the professional corporation is concerned for Marquam to pay for attorney's fees because at that time Marquam was not a taxpaying unit -- had no income and therefore no -- nothing to write off the expense of attorney fees against, whereas the professional corporation would have had to report that as income, which would have resulted in taxation.

Then, it was argued that in the action involving punitive damages, that it might have been advantageous to Marquam to show in relation to its financial ability to pay punitive damages that it owed an account for attorney fees, and then in a fraudulent conveyance case it is argued that that conveyance to Squaw Creek was not recorded until after

the verdict had been entered, and asserted that there was no value given to that.

In the fraudulent conveyance case, it was not necessary to show that the conveyance was fraudulent because there was no consideration because it appeared that there would be consideration for the conveyance; that the consideration being on the part of Martin, that he would contribute his architectural service to this joint venture, but it doesn't -- again, the joint venture agreement has to do with the relationship between Marquam and Martin. It doesn't -- it is not particularly relevant to show the relationship between Marquam and the P.C.

It is argued that somehow the fact that for this condominium development to proceed, it was necessary that seven conditions be performed, and that is argued to show the whole condominium development

thing was a sham to defeat the claim of Brewer.

Then, it was argued that the joint venture agreement did call for legal services. As I understand the joint venture agreement, it indicated that Warde Erwin or Marquam would not charge for legal expenses in the condominium development. It also indicated that Martin would not charge for architectural service, but, again, that doesn't determine whether or not Marquam had a liability to the P.C. for the legal services; it was only that Marquam would not claim reimbursement for those legal services out of the condominium development. It was argued that there was no legal work done after the judgment -- when the judgment was first entered in favor of Brewer, but, of course, the letter of January 1st of '82 shows that

financing was still being sought at that time.

On the other hand, there's evidence to indicate that services were to be compensated first. All we have is testimony of Charles Erwin that such was the intent. We have the fact that neither Charles Erwin nor Mr. Lamb, who are members of the professional corporation, were not stockholders or officers of Marquam and therefore would not derive any benefit from any increase in the assets held by Marquam. The fact that Mr. Erwin spent a great deal of his time over a period of several years devoted to the legal problems of Marquam doesn't seem reasonable to the Court that Mr. Erwin would do that -- would merely contribute his services without compensation when he is not -- has no relationship or no interest in Marquam.

Mr. Erwin testified that during a

part of that period his income was so low that he was required to borrow funds. That doesn't seem to indicate that -- he wouldn't be donating services to a corporation in which he had no financial interest.

Also it appears that there would have been no good purpose served, necessarily, in the professional corporation submitting a bill to Marquam when it was known that Marquam had no funds from which those services could be paid, and submitting such a bill would have just been an effort in futility. Whether or not the attorney fees were mentioned or an account for attorney fees were mentioned in those two lawsuits were a matter of tactical trial tactics and not necessarily evidence that there was no such agreement when the legal services would be compensated. Also it appears that much of the legal services rendered

to Marquam had been rendered prior to the time of the entry into the joint venture agreement.

The importance, it appears, is that that seemed to be a source from which the legal bill of the professional corporation could be paid; that is, from the monies that would be received by Marquam or Mr. Warde Erwin from the development of the condominium appeared, at that time, to be a source for payment of the attorney fees. It isn't important that that finally came to fruition. What was important was what the parties believed at that time. It would seem obvious that Martin would not have contributed his services to the condominium had he felt that this was simply a sham to defeat Brewer's claim and that there was no opportunity for him to ever recover for his services. That would seem to indicate that it was not a sham operation

and that at that time -- at the time of the joint venture agreement -- that appeared to be the only way in which services of the P.C. could be compensated would be if this condominium were developed.

Also, the professional corporation was renting property from Marquam and had for many years made payment of the mortgage of Marquam and credited that against the rent and had credited the balance against the legal fees owing. One of the very significant items of evidence is that time records were kept of the legal services.

If it was understood that there was never to be any payment for those legal services, then it would appear there would be no necessity for keeping time records. So the fact that time records were kept would indicate an understanding that those services were to be paid for.

Without arguing each of those points that I have mentioned the arguments on both sides -- the Court is convinced that the evidence show that the services performed by the professional corporation were not intended to be donated to Marquam but were intended that they would be paid by Marquam when funds were available by Marquam to make payment of those fees, and, therefore, the Court finds that the claim for attorney fees is a valid claim, and the only question then remaining is whether or not the doctrine of equitable subordination will apply to the claim and whether or not the amount of the claim is reasonable.

MR. ROBINOWITZ: I would like to clarify one thing on your findings, Your Honor.

THE COURT: Yes?

MR. ROBINOWITZ: You are making a finding, then, that the work that was

done by the P.C. in regard to the realty development and the administrative procedures and the Brewer versus Abraham case, that all of the work that was done on the condominium project, then, was intended to be compensated?

THE COURT: To the professional corporation.

MR. ROBINOWITZ: To the professional corporation, and that was going to be compensated by Marquam Investment?

THE COURT: Yes.

MR. ROBINOWITZ: Okay. I just wanted to clarify that that is your finding.

THE COURT: I'll ask Mr. Erwin to submit an order to that effect.

MR. C. ERWIN: All right.

THE COURT: Court is in recess.

(Whereupon the hearing was concluded.)

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, JULIE COLLING, a Notary Public for Oregon, hereby certify that, pursuant to stipulation of Counsel for the respective parties hereinabove set forth, the parties personally appeared before me at the time and place set forth int he caption herein; that at said time and place I reported in stenotype all testimony adduced and other oral procedings had in the foregoing matter; that therefore my notes were reduced to typewriting under my direction; and that the foregoing transcript, pages 1 to 201, inclusive, constitutes a full, true and correct record of such testimony adduced and oral proceedings had and of the whole thereof.

WITNESS my hand and notarial

seal at Portland, Oregon, this 19th day of January, 1989.

/s/ Julie Colling

JULIE COLLING
Notary Public for Oregon
My Commission expires: 8/28/91

Charles C. Erwin
Erwin & Erwin, a
Professional Corporation
3323 SW Harbor Drive
Portand, Oregon 97201
Telephone: (503) 226 4525

THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re	)	
	)	
MARQUAM INVESTMENT CORPORATION,	)	No. 383 014888
	)	
Debtor,	)	JUDGMENT
	)	
	)	
BREWER, SUZAN,	)	
	)	
Objector,	)	
	)	
v.	)	
	)	
ERWIN & ERWIN, a Professional Corporation,	)	
	)	
Creditor.	)	
	)	

This matter coming on for trial as a contested case, and the objector, Suzan Brewer, and creditor, Erwin & Erwin, a Professional Corporation, having offered testimony, the court having made findings on the record, and the Trustee having

appeared by his attorney John Durkheimer, and consented and authorized objector, Suzan Brewer, to present this matter.

THE COURT NOW ORDERS that the claims of Erwin & Erwin, Professional Corporation, are allowed and declared valid, pursuant to 11 USC 502. The second of such claim shall be deferred for further consideration by the court.

Date: May 9, 1985

/s/ Henry L. Hess, Jr.

JUDGE HENRY L. HESS, JR.

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED
MAR 25 1988

Terence H. Dunn, Clerk
BY CW DEPUTY

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re	)	Case No.
	)	383-01488-H11
MARQUAM INVESTMENT CORP.,	)	ORDER ALLOWING
	)	CLAIM OF ERWIN
Debtor.	)	& ERWIN

IT IS HEREBY ORDERED that the claim of Erwin & Erwin, P.C., is allowed as a general unsecured claim in the amount of $120,000.

Dated this 24th day of March, 1988.

/s/Henry L. Hess, Jr.
Henry L. Hess, Jr.
Bankruptcy Judge

cc: Charles Erwin
Lawrence Erwin
John Durkheimer
Charles Robinowitz

1-ORDER ALLOWING CLAIM OF ERWIN & ERWIN

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,
Debtor,

SUZAN BREWER,
Plaintiff-appellee,

vs.

ERWIN & ERWIN, Professional Corporation,
Defendant-appellant.

MOTION TO SEVER APPEAL AND

AFFIDAVIT OF CHARLES ROBINOWITZ,

ATTORNEY FOR OBJECTOR-APPELLANMT

Warde H. Erwin
Counsel of Record for Defendant-appellant

Address: 2110 SW Jefferson Street
Portland, Oregon 97201

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201

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MOTION TO SEVER APPEAL

(OBJECTOR-APPELLANT)

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I hereby certify that the foregoing is a complete and exact copy of the original thereof.
Charles Robinowitz
/s/ by B H Camp
Attorney for Appellant

CHARLES ROBINOWITZ
1211 S.W. Fifth, Suite 2962
Portland, OR 503/226-1464
Attorney for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re MARQUAM INVESTMENT CORP., Debtor.	No. Bankr. Ct. No. 383-01488-H11
JOHN B. FRANZWA, INC. Plaintiff/Appellant, -vs- LAVELLE MULLENNEX, WARDE H. ERWIN, and ERWIN & ERWIN, P.C., Defendants/Respondents	Adversary No. 85-0131
SUZAN BREWER, Objector/Appellant, -vs- ERWIN & ERWIN, P.C., Creditor/Respondent.	MOTION TO SEVER APPEAL (Request for Oral Argument)

Appellants move the court for an Order severing the issues in the above-

entitled appeals so that the court will decide first whether Erwin & Erwin, P.C., intend to charge any legal fees to the debtor.

This motion is based on the affidavit of Charles Robinowitz, which is attached.

/s/ Charles Robinowitz

CHARLES ROBINOWITZ

Attorney for Appellants

CHARLES ROBINOWITZ
1211 S.W. Fifth, Suite 2962
Portland, OR 503/226-1464
Attorney for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re	
MARQUAM INVESTMENT CORP.,	No.
Debtor.	Bankr. Ct. No. 383-01488-H11
JOHN B. FRANZWA, INC. Plaintiff/Appellant, -vs- LAVELLE MULLENNEX, WARDE H. ERWIN, and ERWIN & ERWIN, P.C., Defendants/Respondents	Adversary No. 85-0131
SUZAN BREWER, Objector/Appellant, -vs- ERWIN & ERWIN, P.C., Creditor/Respondent.	AFFIDAVIT OF CHARLES HOROWITZ

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, CHARLES ROBINOWITZ, being first duly sworn, do state:

I am the attorney for Suzan Brewer and the Trustee in the above-entitled

appeals. I have represented Suzan Brewer in claims against Marquam Investment Corporation, Warde H. Erwin and Lavelle Mullennex since February 1980, including two appeals to the Oregon Court of Appeals and extensive bankruptcy hearings since May 1983.

The bankruptcy proceeding was essentially a battle between Brewer and the Erwin group for the limited assets of Marquam Investment Corporation. Brewer is a judgment creditor in the Oregon state courts who has an unsatisfied judgment against Marquam for $75,000 punitive damages, $2,880 statutory damages and $1,500 in attorney's fees plus interest from June 1980. Marquam Investment Corporation is an Oregon corporation whose only assets are several real estate parcels in Portland, one of which includes a building housing the law of offices of Erwin & Erwin, P.C. The total

value of Marquam's assets is approximately $170,000 based upon expert testimony in the bankruptcy proceedings.

The Erwin group consists of Warde Erwin, the majority shareholder in Marquam, Lavelle Mullennex, his longtime legal secretary and the only other shareholder in Marquam, Lawrence Erwin, the attorney for Marquam in the bankruptcy proceeding, a former director of Marquam and a son of Warde Erwin, and Charles Erwin, a son of Warde Erwin and a former director of Marquam, who represented Marquam in several Brewer cases and who together with Warde Erwin comprises Erwin & Erwin, P.C.

Erwin & Erwin filed a claim in the bankruptcy court for $120,000 in legal fees, which the bankruptcy court eventually allowed in full. Brewer and the trustee objected to this fee and there were six hearings regarding it. Two

hearings in May 1985 concerned the segregated issue of whether Erwin & Erwin intended to charge any fee to Marquam for their services. The court found in favor of Erwin & Erwin.

Brewer filed a motion for an interlocutory appeal to this court in July 1985. This court used its discretion to deny the appeal on the basis that other rulings by the bankruptcy court may make the issue moot. In 1987 there were four additional hearings on the amount of Erwin & Erwin's fees, and the court allowed the full amount of $120,000. The bankruptcy court also denied a claim by the trustee to subordinate this claim to Brewer's judgement.

If this court reverses the bankruptcy court on its initial finding that Erwin & Erwin intended to charge Marquam for its services, it would not have to decide the issues involved on the amount,

and Brewer and the trustee would not have to order approximately 20 additional hours of testimony and prepare additional lengthy briefs on multiple issues. A decision by this court reversing the bankruptcy court in this regard would also require an automatic reversal and remand of two other decisions by the bankruptcy court. The confirmation plan would be set aside because the essence of the plan discharged the unsatisfied Brewer judgment and awarded over 90 percent of the corporate assets to Erwin & Erwin, based on its #$120,000 claim. The claim for subordination would also be moot.

The bankruptcy court also disallowed a claim by the trustee for $13,056.73 against Erwin & Erwin under its lease because it held that Erwin & Erwin's fees were a setoff against its fees of $120,000. If the fees are disallowed,

Erwin & Erwin would owe this amount to the estate as well as attorney's fees to the trustee.

I believe there is a strong likelihood that Brewer and the trustee will prevail on the question of whether Erwin & Erwin ever intended to charge any fee for legal services to Maraquam, and additional transcripts and briefs on the amount of a fee will not be necessary for the following reasons:

1. There is no written document of any kind mentioning, alluding to or inferring any fee to be paid to Erwin & Erwin;
2. Marquam had no cash or other assets to pay any fee;
3. All financial statements of Marquam prior to the bankruptcy omit any debt to Erwin & Erwin for fees;
4. Payment of any fee by Marquam to

Erwin & Erwin would have transferred a long term capital investment from Warde Erwin and Lavelle Mullennex to taxable current income to Erwin & Erwin, which would have been very unsound tax planning;

5. There were no bills to Marquam over a period of more than seven years and no payments;

6. There was no testimony of outsiders to support an intent to charge a fee; and

7. There were two court trials in 1980 and 1982 involving Brewer and Marquam which concerned the finances of Marquam, and the principals of Marquam never mentioned the existence of any debt to Erwin & Erwin, much less one which would have bankrupted the corporation.

If Brewer and the trustee prevail on this issue, it will shorten considerably the record before this court and the issues it will have to decide.

/s/ Charles Robinowitz

CHARLES ROBINOWITZ

SUBSCRIBED AND SWORN TO before me on this 27th day of April, 1988.

/s/ Beverly H. Camp

NOTARY PUBLIC for Oregon

My Commission Expires: 7-15-89

I hereby certify that the foregoing is a complete and exact copy of the original thereof.
Charles Robinowitz
/s/ by B H Camp
Attorney for Appellant

CHARLES ROBINOWITZ
1211 S.W. Fifth, Suite 2962
Portland, OR 503/226-1464
Attorney for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re	
MARQUAM INVESTMENT CORP.,	No.
Debtor.	Bankr. Ct. No. 383-01488-H11
JOHN B. FRANZWA, INC. Plaintiff/Appellant, -vs- LAVELLE MULLENNEX, WARDE H. ERWIN, and ERWIN & ERWIN, P.C., Defendants/Respondents	Adversary No. 85-0131
SUZAN BREWER, Objector/Appellant, -vs- ERWIN & ERWIN, P.C., Creditor/Respondent.	

IT IS HEREBY ORDERED that:

1. The appellants' motion to sever

is granted, and the appellants shall file the transcript on the issue of whether Erwin & Erwin, P.C., intended to charge any legal fees to the debtor by July 1, 1988. The bankruptcy clerk shall then schedule the filing of briefs on that issue; and

2. The appellants' brief on the issue of attorney's fees and costs of the Law Office of Lawrence W. Erwin, P.C., shall be filed on June 22, 1988,s and the reply brief is due August 5, 1988.

DATED this ____ day of June, 1988.

JAMES M. REDDEN
U. S. DISTRICT COURT JUDGE

Submitted by:

CHARLES ROBINOWITZ
Attorney for Appellants

MAR 8 3:05 PM '90
Clerk, U.S. District
Court, District of
Oregon
By _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re MARQUAM INVESTMENT CORP., Debtor.	Civil No. 88-0915-PA Bankruptcy No. 383-01488-H11
SUZAN BREWER, Objector/Appellant, -vs- ERWIN & ERWIN, P.C., Creditor/Respondent.	ORDER

REDDEN, J.

The bankruptcy court's orders allowing Erwin's claim for attorney's fees are reversed. The case is remanded to the bankruptcy court for the entry of an

order disallowing Erwin & Erwin's claim for attorney's fees in its entirety.

IT IS SO ORDERED.

DATED this 8 day of March, 1990.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,
Debtor,

SUZAN BREWER,
Plaintiff-appellee,

vs.

ERWIN & ERWIN, Professional Corporation,
Defendant-appellant.

OPINION OF NINTH CIRCUIT

COURT OF APPEALS PANEL

August 26, 1991

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NINTH CIRCUIT COURT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: MARQUAM INVESTMENT CORPORATION, Debtor,	)	No. 90-35312 D.C. No. CV-88-915-RE
SUSAN BREWER, Plaintiff-appellee, vs. ERWIN & ERWIN, P.C., Defendant-appellant.	)	OPINION

Appeal from the United States District Court for the District of Oregon

James A. Redden, District Judge, Presiding

RECEIVED

August 28, 1991

Argued and Submitted

July 11, 1991 -- Portland, Oregon

Filed August 26, 1991

Before Arthur L. Alarcon,

Warren J. Ferguson and

Cynthia Holcomb Hall, Circuit Judges

Opinion by Judge Alarcon

SUMMARY

Bankruptcy/Attorney's Fees

Affirming a district court judgment reversing a decision by the Bankruptcy Court allowing a law firm's unsecured claim for attorney's fees, the court of appeals held that the bankruptcy court erred as a matter of law in not subjecting the law firm's claim to the rigorous scrutiny and burden of proof required of an insider.

Susan Brewer obtained a state court judgment on a tort claim against Marquam Investment Corporation for $97,880. Marquam was owned by Warde Erwin and his legal ecretary. Charles Erwin, Warde's

son, was vice-president and director of Marquam. Both Warde and Charles practice law as Erwin & Erwin, P.C. When the Oregon Supreme Court denied review of Brewer's tort claim judgment, Marquam filed for bankruptcy. The bankruptcy petition listed Erwin, Lamb & Erwin as creditors regarding an unsecured claim for attorneys' fees rendered for defense and services in various lawsuits entailed in representation of Marquam. The bankruptcy court concluded that the law firm did not intend to donate its legal services to the creditor and allowed the claim. The district court reversed the bankruptcy court's judgment.

[1] The court agreed with Brewer that the Bankruptcy Court erred as a matter of law in concluding that Charles Erwin had no relationship or ownership interest in Marquam. As president and vice-president of Marquam, the Erwin's

qualified as insiders of that company. The bankruptcy court's conclusion to the contrary was erroneous as a matter law. [2] An insider's dealings with a bankrupt corporation must be subjected to rigorous scrutiny. [3] When the validity of an insider's contract with a corporation is at issue, the burden is on the insider not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested in it. [4] The bankruptcy court erred in not expressly placing the burden on the Erwin law firm to prove that it entered into an agreement in good faith with Marquam for legal services. No evidence was presented that Marquam agreed to pay for any services furnished by the Erwin law firm. No entries of the debt or the rendition of serices was recorded. The Erwin law firm did not

send a bill for its legal services prior to the date Marquam filed a petition in bankrtupcy. [5] Because the bankruptcy court failed to subject the Erwin law firm's claim to the rigorous scrutiny and the burden of proof required of an insider, its judgment could not stand. [6] The court also agreed that the bankruptcy court's finding that the Erwin law firm's claim for legal services was valid was clearly erroneous. [7] After reviewing the evidence in the record before the bankruptcy court, the appeals court was left with a definite and firm conviction that the bankruptcy court was mistaken in finding that the Marquam company entered into a contract to pay the Erwin law firm for its legal services. [8] Assuming the district court erred in considering matters outside the record in reaching a correct conclusion, any error did not have any

impact on the appeals court's decision in this matter.

COUNSEL

Charles C. Erwin, Erwin & Erwin, Portland, Oregon, for the defendant-appellant.

Charles Robinowitz, Portland, Oregon, for the plaintiff-appellee.

OPINION

ALARCON, Circuit Judge:

Erwin & Erwin, P.C., a law firm, (the Erwin law firm) appeals from the reversal, by the district court, of the bankruptcy court's order allowing the Erwin law firm's unsecured claim for attorneys' fees against the debtor, Marquam Investment Corporation (Marqum). The Erwin law firm seeks reversal on the ground that the district court erred in concluding that the bankruptcy court's

finding, that the Erwin law firm did not intend to donate its legal services to the creditor, was clearly erroneous. Appellant's Brief at 2. We affirm the judgment entered by the district court because our independent review of the record before the bankruptcy court has convinced us that the bankruptcy court erred in fiding that Marquam agreed to pay the Erwin law firm for any legal services.

The Erwin law firm also contends that the district court considered matters that were outside the record of the bank-ruptcy proceedings, and, as a result, made improper findings of fact. Because our review of the bankruptcy court's decision is de novo, any error that may have occurred resulting from the district court's alleged consideration of matters not on the record would be completely harmless.

I

PERTINENT FACTS AND PROCEDURAL POSTURE

Marquam Corporation is a landholding company whose assets consist of an office building and several unimproved properties. Warde Erwin is the prsident of Marquam. He owns 60% of Marquam's shares of stock. LaVelle Mullennex owns 40% of Marquam's stock. Charles Erwin was designated as the vice-president and a director of Marquam in the petition for bankruptcy. Warde Erwin and his son, Charles, practice laws under the firm name, Erwin & Erwin, P.C. LaVelle Mullennex is Warde Erwin's legal secretary.

Suzan Brewer is a former tenant of Marquam. A dispute arose when Marquam sought to evict Brewer in order to demolish the house in which Brewer was living. Brewer sued Marquam in 1976 for intentional infliction of emotional

distress and violation of the Oregon Residential Landlord and Tenant Act, ORS 91.700-.895. On June 20, 1980, the jury returned a verdict in favor of Brewer. The jury awarded a total of $22,880 in general damages and $75,000 in punitive damages.

On June 23, 1980, three days after the jury returned its verdict, Marquam transferred its unimproved lots to Squaw Creek Construction Company. Brewer filed a fraudulent conveyance action in state court against Marquam. On April 21, 1982, the state court set aside the transfer to the Squaw Creek Construction Company.

Marquam filed an appeal from the judgment in favor of Brewer in the tort action. On April 26, 1983, the Oregon Supreme Court denied final review of the 1980 judgment. Eight days later, on May 4, 1983, Marquam filed for bankruptcy.

It listed assets totaling $107,152.

The bankruptcy petition prepared by Warde H. Erwin as President of Marquam, the debtor corprotion, listed Erwin, Lamb & Erwin as creditors regarding an unsecured claim "[f]or attorneys' fees rendered starting (sic) in April of 1976 to date for defense and services in various lawsuits entailed in representation of Marquam."

No billing or any corporate documents evidencing that a debt for attorneys' fees was incurred by Marquam was attached to the petition in bankruptcy. Furthermore, no time slips were submitted with the petition. Time slips were attached to the Erwin law firm's amended claim filed in 1986.

At the hearing before the bankruptcy court, the Erwin law firm did not produce an account receivable or any billing to Marquam for legal services. No corporate

records, such as the minutes of a board of director's meeting or an account payable, were offered to show that Marquam had agreed to pay the Erwin law firm for legal services.

The bankruptcy court recognized that there was no documentary evidence to support the Erwin law firm's claim that Marquam intended to enter into a contract to pay for legal services. The bankruptcy court stated: "All we have is the testimony of Charles Erwin that such was the intent." Nevertheless, the bankruptcy court found that "the evidence shows that the services performed by the professional corporation were not intended to be donated to Marquam but were intended that they would be paid by Marquam when funds were available by Marquam to make payment of those fees...."

On March 24, 1988, the bankruptcy court approved Marquam's chapter 11 plan

and allowed the Erwin law firm's claim for $120,000 in attorney fees. Brewer's $75,000 punitive damages claim was discharged pursuant to 11 U.S.C. Sec. Sec. 726(a)(4) because there were insufficient funds in the bankrupt's estate to reach it.

II

DISCUSSION

A. Function of Court of Appeals in Reviewing A Bankruptcy Court's Findings and Conclusions

This matter is before this court following reversal by the district court of the bankruptcy court's findings and conclusions of law concerning a law firm's claim for attorney's fees against the debtor. Our review of the bankruptcy court's order is de novo.

Because we are in as good a position as the district court to review

> the findings for the bankruptcy court's decision. See, e.g., In re Mellor, 734 F.2d 1396, 1299 (9th Cir. 1984); In re Comer, 723 F.2d 737, 739 (9th Cir. 1984); In re Bialac, 712 F.2d 426, 429 (9th Cir. 1983). We review the bankruptcy court's findings of fact under the clearly erroneous standard and its conclusion of law de novo. In re American Mariner Industries, Inc., 734 F.2d 426, 429 (9th Cir. 1984). (Footnote omitted).

Pizza of Hawaii, Inc., 761 F.2d 1374, 1377 (9th Cir. 1985). Thus, we are in realty reviewing the claims of error presented by the party that did not prevail before the bankruptcy court. While Brewer is nominally the appellee before this court, it is her challenge to

the Bankruptcy court's findings and conclusions of law that we must review. By the same token, although designated as the appellant, the Erwin law firm's mission before this court is to defend the victory it achieved in the bankruptcy court.

B. Impact of Insider Status on Proof of Attorney Fee Claim

[1] Brewer argues that the bankruptcy court erred as a matter of law in concluding that Charles Erwin "has no relationship or no ownership interest in Marquam." We review de novo a bankruptcy court's conclusion of law. Ragsdale v. Haller, 780 F.2d 794. 795 (9th Cir. 1986). The term "insider" includes a director, officer, or person in control of a debtor corporation. 11 U.S.C. Sec. 101(30)(B)(i)(ii)(iii). A relative of a director, officer, or person in control

of the corporation was the president of Marquam. His son, Charles Erwin was listed as Marquam's director and vice-president in Marquam's 1983 bankruptcy petition. Thus, Warde Erwin and Charles Erwin were insiders of Marquam. The bankruptcy court's conclusion that Charles Erwin was not an insider was erroneous as a matter of law.

[2] The bankruptcy court's failure to recognize that Charles Erwin was an insider may explain its finding that the Erwin law firm's claim for legal services was a valid debt of the corporation. The Supreme Court has instructed that an insider's dealings with a bankrupt corporation must be "subjected to rigorous scrutiny." Pepper v. Litton, 308 U.S. 295, 306 (1939).

[3] When the validity of an insider's contract with a corporation is at issue, the burden is on the insider

"not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interest therein." Id.

The court also explained in Pepper v. Litton, the test that must be applied to an insider's transaction with a corporation:

> The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.

Id. at 306-307.

[4] The bankruptcy court did not expressly place the burden on the Erwin law firm to prove that it entered into an agreement in good faith with Marquam for legal services. No evidence was offered

that Marquam agreed to pay for any services furnished by the Erwin law firm. The Erwin law firm did not record its alleged services to Marquam in an account receivable. The corporation did not enter legal expenses owed the law firm as an account pawyable. No evidence was presented of any corporate minutes reflecting a decision to enter into an agreement with the Erwin law firm for legal services.

The bankruptcy court based its finding that Marquam owed the law firm $120,000 for legal services primarily on Charles Erwin's testimony that he did not intend to donate his legal services. The bankruptcy court's reasoning can be summarized as follows:

A lawyer is entitled to payment for legal services performed pursuant to an agreement with a bankrupt corporation.

Charles Erwin did not intend to

donate his legal services to the Marquam Investment Corporation.

Therefore, the Marquam Investment Corporation promised to pay Charles Erwin for his legal services.

This flawed syllogism not only defies elementary precepts of logic, it violates fundamental principles of contract law that require mutuality of assent, and ignores the burden placed upon an insider to prove that the debt resulted from an arm's length transaction that can withstand rigorous scrutiny.

[5] Because the bankruptcy court failed to subject the Erwin law firm's claim to the rigorous scrutiny and the burden of proof required of an insider, its judgment cannot stand.

C. Application of the Clearly Erroneous Standard

[6] Brewer also asserts that the

bankruptcy court's finding that the Erwin law firm's claim for legal services was valid is clearly erroneous. We agree.

A trial court's finding of fact is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364. 395 (1948). Upon a review of the record before the court, we have a definite and firm conviction that a mistake has been made in this matter.

The facts before the bankruptcy court demonstrate that a corporation controlled by members of the Erwin law firm has successfully avoided payment of a state court judgment entered more than 11 years ago in favor of Brrewer and against Marquam.

Eight days after the Oregon Supreme

Court denied final review of the 1980 judgment, Marquam filed a petition in bankruptcy listing its assets at $107,152, and the claim of the Erwin law firm for $120,000 in unbilled legal services. As set forth above, this claim is not supported by corporate minutes, an account payable, or any record of any billing for legal services. Under all the circumstances presented in the record before the bankruptcy court, we have concluded the testimony of the corporate insiders in support of the Erwin law firm's claim for legal services is so "implausible on its fact that a reasonable fact finder would not credit it." Anderson v. City of Bessemer City, North Carolina, 470 U.S,. 564, 575 (1985).

[7] After reviewing the evidence in the record before the bankruptcy court, we are left with a definite and firm conviction that the bankruptcy court was

mistaken in finding that the Marquam Investment Corporation entered into a contract to pay the Erwin law firm for its legal services. Accordingly, we hold that Charles Erwin did not intend to donate his legal services is clearly erroneous.

D. Consideration by the District Court of Matters Outside the Record.

[8] The Erwin law firm contends that the district court erred in considering matters outside the record and made impermissible findings in reversing the bankruptcy court. As set forth above, we have reviewed the findings of fact and conclusions of law of the bankrtupcy court without deference to the district court's decision on these matters, as required by the law of this circuit. Our de novo or independent review has convinced us that the

bankruptcy court's decision must be reversed. That is the ultimate conclusion reached by the district court. "[W]e may affirm the district court based on any reasosn finding support in the record." Welch v. Fritz, 909 F.2d 1330, 1331, (9th Cir. 1990). Thus, assuming arguendo that the district court erred in reaching a correct conclusion, any error by the district court has had no impact on our decision in this matter.

E. Failure of the District Court to Hold a Hearing

The Erwin law firm asserts that the district court by ruling without a hearing or an opportunity for oral argument did not comply with Fed. R. Bankr. 8012. The Erwin law firm, however, failed to provide "[a] statement of the issue[s] presented, and the reasons

therefor, with citations to the authorities, statutes and parts of the record relied on." Fed. R. Bankr. 8010(E) Erwin's failure to comply with Rule 8010(C) waives this issue on appeal. See Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 912 (9th Cir. 1988). (Failure to comply with the parallel rule, Fed. R. App. P.28(a)(4), waives the issue on appeal.)

F. Request for Judicial Notice

Brewer asks this court to take judicial notice of facts which are not readily determinable by resort to unquestionable sources. We may not take judicial notice of facts which are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned." Fed R. Evid. 201(b)(2). Brewer's request for judicial notice is denied.

AFFIRMED.

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,
Debtor,

SUZAN BREWER,
Plaintiff-appellee,
vs.
ERWIN & ERWIN, Professional Corporation,
Defendant-appellant.

ORDER OF MARCH 24, 1992

NINTH CIRCUIT COURT OF APPEALS

PANEL

LEVYING SANCTIONS OF $5058.75

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ORDER OF MARCH 24, 1992

NINTH CIRCUIT PANEL

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FOR PUBLICATION

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	)	No. 90-35312 D.C. No. CV-88-915-RE
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	)	ORDER AND DISSENT

Filed March 24, 1992

Before: Arthur L. Alarcon, Warren J. Ferguson and Cynthia Holcomb Hall, Circuit Judges

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ORDER

After receiving a favorable decision in chief (In re Marquam Inv. Corp., 942 F.2d 1462 [9th Cir. 1991]), the plaintiff-appellee seeks attorney fees against the appellant pursuant to Rule 38 of the Federal Rules of Appellate

Procedure, which provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs of the appellee." Fed. R. App. P. 38 advisory committee note states that damages may be awarded in frivolous appeals as a matter of justice to the appellee and as a penalty against the appellant.

In our reported opinion on the case in chief, we affirmed the district court's ruling and declared that the bankruptcy court clearly erred in finding that Marquam agreed to pay the Erwin law firm for any legal services. In re Marquam, 941 F.2d at 1466. First, we agreed with the district court that it was clear beyond dispute that the Erwins were insiders in the Marquam corporation as a matter of law. The Supreme Court in Pepper v. Litton, 308 U.S. 295 (1939) declared that an insider must prove the

good faith of the transaction and its inherent fairness. There were no billings or corporate documents evidencing a debt for attorney fees, nor were there any accounts receivable or billings for legal services. In Re Marquam, 942 F.2d at 1466. The bankruptcy court acknowledged that "all we have is the testimony of Charles Erwin that such (legal services for pay) was the intent." Id. at 1464. Nevertheless, despite the lack of documentary evidence in a situation where the burden was on appellant to show the good faith of the transaction, the bankruptcy court allowed the claim for attorney fees. The district court overturned this ruling, and we easily affirmed. We also pointed out that the reasoning of the bankruptcy court was a flawed syllogism that not only defied elementary precepts of logic but also fundamental purposes of contract law.

Id. at 1466. With this factual and legal background, any appeal from the district court's reversal of the bankruptcy court was beyond doubt frivolous to the extreme. See McConnell v. Critchlow, 661 F.2d 116, 118 (9th Cir. 1981) (appeal is frivolous when result is obvious or appellant's arguments of error are wholly without merit).

The appeal of the appellant to this court is frivolous within Fed. R. App. P. 38, and the request for attorney fees of $5,058.75 is reasonable and just.

It is therefore ordered that the amount of $5,058.75 is awarded to the appellees against the appellant Erwin & Erwin, P.C. as damages pursuant to Rule 38 of the Federal Rules of Appellate Procedure.

ALARCON, Circuit Judge, Dissenting

I would deny Susan Brewer's request for attorney's fees in this matter.

Brewer seeks attorney's fees pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Rule 38 provides that attorney's fees may be awarded if an appeal is frivolous. I respectfully disagree with my colleagues' conclusion that the appeal from the district court's reversal of the bankruptcy court's judgment, filed by Erwin & Erwin, P.C. (the Erwin law firm) was frivolous.

In this matter, the bankruptcy judge ruled in favor of the Erwin law firm. The appeal from the bankruptcy court's ruling was taken by Brewer, not the Erwin law firm. In our independent review of the bankruptcy court's judgment in favor of the Erwin law firm, we held that the bankruptcy court erred as a matter of law in concluding that Charles Erwin was not an insider. In re Marquam Inv. Corp., 942 F.2d 1462, 1465-66 (9th Cir. 1991).

Punishment of the party that prevailed in the trial court under Rule 38 for seeking to uphold a favorable judgment appears to be a bizarre application of a rule designed to discourage frivolous appeals by the party that lost in the trial court. The majority has not cited any case that lost in the trial court. In McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981), the only authority cited by the majority, we imposed sanctions against a party that filed an appeal from the dismissal by the district court of a civil rights action based on arrests that took place 4 to 15 years before the filing of his complaint. We concluded that the appeal was frivolous because "McConnell made no argument on appeal as to why the limitations period had not run." Id. at 117. In this matter, the Erwin law firm vigorously, albeit erroneously, contested the

district court's reversal of the judgment court.

The reversal of the bankruptcy court's judgment by the district court's judgment simply demonstrated that two judges disagreed in their interpretation of the law regarding an insider's duties, not that either party's legal arguments were frivolous. The Erwin law firm had the right to seek review of the district court's reversal of the bankruptcy judge's judgment upholding the claim for legal fees. Failure to do so in light of the bankruptcy judge's favorable decision may have bordered on malpractice. I cannot concur in the majority's conclusion that the Erwin law firm's decision to have this court resolve this conflict between the two courts was frivolous.

This court has the duty to review a bankrtupcy court's decision de novo without deference to the district court's

legal conclusions. In re Marquam Inv. Corp., 941 F.2d at 1465. In the Marquam decision, we described our role in reviewing a bankruptcy court's decision as follows:

> [W]e are in reality reviewing the claims of error presented by the party that did not prevail before the bankruptcy court. While Brewer is nominally the appellee before this court, it is her challenge to the bankruptcy court's findings and conclusions of law that we must review. By the same token, although designated as the appellant, the Erwin law firm's mission before this court is to defend the victory it achieved in the bankruptcy court.

Id.

The effect of the majority's

conclusion to award attorney's fees in favor of the party that lost before the bankruptcy court is that a party that seeks to sustain a bankruptcy judge's judgment risks incurring sanctions if this court disagrees with the bankruptcy court's interpretation of the law. I seriously doubt that the drafters of Rule 38 intended to sanction a party that prevailed in the bankruptcy court whenever we conclude that the bankruptcy court erred.

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
July 22, 1992
CATHY A. CATTERSON
Clerk
U.S. COURT OF APPEALS

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	No. 90-35312 D.C. No. CV-88-915-RE O R D E R

ALARCON, Circuit Judge

Appellant's petition for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure, for arrest of judgment, and for reconsideration of the opinion of this court is denied.

Appellant, Erwin & Erwin, P.C., is directed to pay a sanction of $2,500 plus-

interest until paid to the Clerk of this Court pursuant to Rule 38 of the Federal Appellate Procedure.

Judge Alarcon votes against the imposition of a further sanction.

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
July 28, 1992
CATHY A. CATTERSON
Clerk
U.S. COURT OF
APPEALS

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	No. 90-35312 D.C. No. CV-88-915-RE O R D E R

ALARCON, Circuit Judge

The order filed July 22, 1992 directing appellant, Erwin & Erwin, P.C. to pay a sanction of $2,500 plus interest is hereby ordered vacated.

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
July 22, 1992
CATHY A. CATTERSON
Clerk
U.S. COURT OF
APPEALS

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	No. 90-35312 D.C. No. CV-88-915-RE O R D E R

ALARCON, Circuit Judge

Appellant's motion for an order permitting the filing of an excerpt is granted.

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
August 10, 1992
CATHY A. CATTERSON
Clerk
U.S. COURT OF
APPEALS

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	No. 90-35312 D.C. No. CV-88-915-RE O R D E R

Before: ALARCON, Ferguson and Hall,

Circuit Judges

Appellant's petition for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure for arrest of judgment and for reconsideration of the opinion of this court is denied.

Appellant, Erwin & Erwin, P.C. is directed to pay a sanction of $2,500 pursuant to Rule 38 of the Federal Appellate Procedure.

Judge Alarcon votes against the imposition of a further sanction.

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
August 13, 1992
CATHY A. CATTERSON
Clerk
U.S. COURT OF
APPEALS

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	No. 90-35312 D.C. No. CV-88-915-RE O R D E R

Before: ALARCON, Ferguson and Hall, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Alarcon and Hall have voted to reject the suggestion for a rehearing en banc. Judge Ferguson so recommends.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,)
)
Debtor.)
)
)
SUZAN BREWER,)
)
Plaintiff-appellee,)
)
vs.)
)
ERWIN & ERWIN, P.C.,)
)
Defendant-appellant.)
)

RE: DOCKET ENTRIES - UNITED STATES BANKRUPTCY COURT CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT COURT

Warde H. Erwin
Counsel of Record for Defendant-appellant
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201-7702

Charles C. Erwin
Additional Counsel
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DISTRICT OF OREGON

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	???Master Address List
	Order ????? and Fixing Bond
May 5	
5/19/83	Oral resignation of Fitzgerald, Interim Trustee (Written to follow)
"	Order Appointing Interim Trustee and Fixing the Bond Amount (Franzwa)
6/3/83	ORDER FOR MEETING OF CREDITORS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY, Certificate of Mailing, June 13, 1983, at 2:00 p.m. #4
6/15/83	Application and Affidavit for Employment of Attorneys
6/21/83	Inventory and Report of Assets
6/27/83	Order Authorizing Employment of Attorneys
7/7/83	Application to Employ Real

Estate Broker and Order Thereon

7/12/83 Application to Convert to Ch 11 Proceedings

7/15/83 Order Converting A Chapter 7 Case to A Case Under Ch. 11 (Documents due 7/29/83)

7/18/83 List of Ten Largest Unsecured Creditors

7/19/83 Corres: Organizational Meeting August 8, 1983 at 9:45 AM in Hrg. Rm. #4

" Notice of Indemnity Hearing Aug. 8, 1983 at 11:00 AM in #1

7/22/83 Debtors Voluntary Petition CH. 11, Statement of Affairs, Schedules, Master Address List

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7/27/83 Request for Notice

8-1-83 Trustee's Report, Resignation And Petition for Reimbursement of Expenses

8-2-83 Order For Meeting of Creditors,

Combined With Notice Thereof And of Automatic Stays - August 24, 1983 at 10:30 am in Courtroom No 2

8-3-83 Monthly Financial Report - as of August 1, 1983

8-3-83 Preliminary Order Appointing Creditors Committee

" Order of Designation

" Order Requring Debtor to File Financial Reports

8-11-83 ORDER - - debtor ordered not to expend any assets prior to hearing on Aug. 24, 1983

8-10-83 Application for Allowance of Compensation And Reunbursement of Expense

8/16/83 Motions for Orders (1) Converting Case to Chapter 7 Proceeding or in The Alternative (2) Appointing Trustee (3) Imposing Conditions and (4) Requiring Indenmity Bond (by Susan Brewer)

(Filed by Michael H. Marcus Atty)

" Notice of Hearing (re above Motions by Brewer) August 24, 1983 3:30 P.M. #1

" Affidavit of Michael H. Marcus in support of Motions

8/18/83 Transcript of Hearing on Aug. 8, 1983, in Courtroom No. 1, See separate transcript file. jc

8/24/83 Opposition to Motion for Orders (1) Converting Case to Chapter 7 or in Alternative (2)Appointing Trustee (3) Imposing Conditions and (4) Requiring Indenmity Bond (by Attorney for Debtor)

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9-15-83 Supplemental Affidavit of Michael H. Marcus in Support of Motions

9-21-83 Proposed Plan of Reorganization

9-21-83 Disclosure Statement

9-21-83 Cert. of Mailing

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9-29-83 Response to Application to Employ Professional Persons

9-30-83 Objection to Proof of Claim -#2 Suzan Brewer -(Obj. filed by debtor)

10-3-83 Objections to Debtor's Application To Hire Appraisers

10-7-83 Financial Statement for September 1983

10-3-83 Order

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10-14-83 Amended Notice of Hearng on Proposed Disc. Statement and Hearing on Objection to Claims - November 14, 1983 at 2:15 pm in Courtroom No. 1
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10/18/83 Objection to Disclosure Statement - Susan Brewer

10/18/83 Objections to Proof of Claim -

" Suzan Brewer (filed by Robinowitz for Brewer)
Request for Resetting of Hearing on Disclosure Statement and objection to claim

" Correspondence from C. Erwin re objection to claim of Susan Brewer

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10/28/83 Answer Pursuant to Bankruptcy Rule 3007 and Bankruptcy Rule 7001

11/2/83 Trustee's Report on Disclosure Statement and Plan of Arrangement

11/8/83 Notice of Creditors' Acceptance of Disclosure Statement

11/9/83 Financial Statement - Sept. 30 to Nov. 1, 1983

11/10/83 Affidavit of Service by Mail-

11/14/83 Order Continuing Hearing on Objection to Proposed Disclosure Statement and Continuing Hearong on Objections to Claim- Nov. 28, 1983, at 11:00 a.m. #1

11-18-83 Motion to Dismiss Brewer's Obj. to Claims contained in

Brewer's Obj (end 5-1-84) to Disl. Statement

11/18/83 Notice Under Local Rule 106 - U. S. District Court Brewer's"Claim to Avoid Lease," Is to be Heard Elsewhere

11/18/83 Correspondence re: administrative clarification of above notice

11/18/83 Amended Objections to Proof of Claim

11/21/83 Response to Objections to Proof of Claim

11/21/83 Response to Proof of Claim Objections

11/21/83 Response to Proof of Claim Objections

11/21/83 MOTION FOR RELIEF FROM STAY (Brewer)

11/21/83 NOTICE OF MOTION FOR RELIEF

11/29/83 Correspondence re Erwin-Mullennex claims

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3/2/84 Transcript of Hearing on Nov. 28, 1984 (see separate transcript file)

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3/6/84 Correspondence re: cont. hrg set for 3/6/84 to be continued to 5/1/84 1:30

3/30/84 ORDER Re: Objections to Claim of Lawrence W. Erwin (Claim is allowed as valid; any objections as to amount shall be heard upon request of Object Parties (cc C.

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3/30/84 ORDER (re Suzan Brewer' Motion to lift Automatic stay) See file for particulars cc C. Erwin, L. Erwin, C. Robinowitz, J. Durkheimer (eod 4/3/84 r

3/30/84 ORDER (Susan Brewer shall disclose the identity of CPA or Attorney Witness yet to be called in her obj to claim of Erwin & Erwin and a summary of those witnesses' testimony on or before April 6, 1984 (eod 4/3/84 rb)

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4/26/84 Memorandum of Charles Robinowitz, attorney for Susan Brewer (docketed 5/1/84)

5/1/84 Debtor's Opposition to Motion (of Suzan Brewwer) to Set Aside the Order of March 30, 1984 of Judge Johnson

5/7/84 ORDER DISBURSING FUNDS

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7/18/84 Trustee's Atty Objection to Proposed Expenditure (payment of electrical and plumbing repairs)

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12-20-84 MOTION to Compel Compliance with Orders of the Court eod 12/27/84 Correspondence re:

Status hearing on objections to claims and motion to compel compliance with orders of the court scheduled - Mon, Jan 21, 1985 at 1-:00 CTRM 2 eod 12/27/84

JAN 16 1985 Rule 2015 Report of Debtor in-possession for period of 12/15 84 thru 1/10/85

1/21/85 ORDER Requiring Discovery Be Made

1/28/85 Continued Hearing on Ms. Brewer's objections to claim of Erwin & Erwin, P.C.-Tues. Apr. 2, 1985 at 9:30 a.m. Ctrm #2

1/31/85 Objections of Suzan Brewer to Proposed Distribution of Settlement Funds

2/4/85 Summary of Proposed Testimony of Richard B. Solomon (fld by Suzan Brewer)

2/14/85 Rule 2015 Report of Debtor-In-Possession for Period of 12/15/84 thru 1-10-85

2/25/85 Hrg on Suzan Brewer's Objections

to proposed distribution of settlement funds - Tue. Apr. 2, 1985 at 9:30 a.m. (the same time set for the conued hrg on Ms. Brewer's objections to claims)

" Applic. of debtor for Disbursement of Funds and ORDER THEREON

" ORDER RE: disbursements of settlement funds

3/1/85 Final Applic. of debtor's attorney for Compensation for Professional Services by Attorney

3-6-85 Hrg on final applic. for compensation (Lawrence Erwin) - Tue. Apr. 2, 1985 at 9:30 a.m. Ctrm #2

MAR 13 1985 Rule 2015 Report of Debtor-In-Possession for the Period of 2/10/85 thru 3/10/85

3/21/85 NOTICE of Depo: Dehbtor Trustee, Attys: 3/25/85 9 am Irwin office

3/27/85 SUMMARY OF TESTIMONY OF ROY L. GRIFFIN CPA

4/1/85 Certificate of Service-Subpoena

to Witness (Erwin)

4/2/85 Certificate of Service - Subpoena (Mullennex)

4/3/85 COMPLAINT 437/497 85-0131 (Franzwa v. Erwin et al)

4/5/85 Continued Hrg (corres. did not state what kind of hearing) - Mon. May 6, 1985 at 9:30 a.m. and Tue. May 7, 1985 at 9:30 a.m. Ctrm #2

4/12/85 Notice of Hearing - on debtor's amended motion for classification of claims - Mon. May 6, 1985 at 9:30 a.m. Ctrm #2 and Tue. May 7, 1985 at 9:30 a.m. Ctrm #2

4/12/85 Certificate of Service of Subpoena to Witness-Lavelle Mullenex

4/12/85 Certificate of Service of Subpoena to Witness-Custodian of Records, Benj. Franklin Savings, Angel Nielson

4/12/85 Certificate of Service of Subpoena to Witness- Hon. Philip

T. Abraham, Laury Swan

4/15/85 Certificate of Service of Subpoena to Witness-James T. Marquoit, Linda Walls

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4/26/85 Corres from the court to parties: (1) hrg on Suzan Brewer's Objection to claim of Erwin, Lamb etc. set for Mon. May 6, 1985, at 1:30 p.m. Ctrm #2-if necessary, this one matter can be concluded on Tue. May 7, 1985 at 9:30 a.m. (2) court does not wish to considerr objections to disl. state, or motion for classification of claims at this time (3) pretrial conference in Franzwa, Inc. v. Erwin et al, Adv. Pro. #

85-0131 H remains unchanged

4/29/85 Corres. re: Claim of Brewer

5/2/85 Brewer's Seconded Amended Objection to Proof of Claim of Erwin &Erwin

5/6/85 Rule 41 Motion to Dismiss (Rule 7041 Bankruptcy Rules) - fld by Creditor, Erwin & Erwin

5/6/85 Rule 41 Supplemental Motion to Dismiss (Rule 7041 Bankruptcy Rules) fld by Erwin & Erwin

5/9/85 JUDGMENT Re: Claim of Erwin & Erwin, creditor

MAY 15 1985 Rule 2015 Report of Debtor-In-Possession for the period of 3/10/85 thru 4/10/85

5/16/85 ORDER TO SHOW CAUSE RE:) Mon. Jun. 3, 1985 aat 9:15 a.m. Ctrm #2

DISMISSAL, CONVERSION)

(Failure to file adequate monthly report)

OR OTHER RELIEF

5/17/85 Transcript of Proceedings - Apr 2, 1985 at 9:30 a.m. See separate transcript file Vol.2

5/21/85 Corres. - Hrg scheduled (show cause) 7/3/85 at 9:15 a.m. Ctrm #2 cancelled

5/22/85 Profit and Loss and Balance Sheet for March (end April 10, 1985) that was missing from the Rule 2015 Report for the period of 3/10/85 thr 4/10/85

5/22/85 Precautionary Motion for Leave to Appeal pursuant to 28 USC # 1334 (b)

ORAL ARGUMENT ON MOTION REQUESTED

5/22/85 NOTICE OF APPEAL (7/L6/85 (? DENIED)

5/22/85 Notification of Motion for Leave to Appeal & Notice of Appeal to all parties & staying proceedings until DC

	decides Motion cc:
VOL.6	copies to Erwin, Erwin, Durkheimer, Robinowitz
5/29/85	MOTION to Dismiss Appeal
5/31/85	Motion to (1) Allow Resignation of Trustee, (2) Substitute Party-Plaintiff, and (3) Appoint a Custodian -
5/31/85	MEMORANDUM in Support of Motion to Dismiss Appeal not Timely Filed (?)
5/31/85	ANSWER in Opposition to Precautionary Motion for Leave to Appeal Interlocutory Order
6/3/85	STATEMENT of Present Appellant Issues by Appellee (Appeal)
6/4/85	Corresp re: Hearing on Trustee's motion to (1) Allow Resignation of Trustee (2) Substitute party-plaintiff, and (3) Appoint a Custodian- Thurs, June 13, 1985 at 10:30

CTM 2

6/5/85 Nonopposition to Motion to Allow Resignation of Trustee; Opposition to Motion to Substitute Party Plaintiff; and Opposition to Motion to Appoint Custodian

6/7/85 Response to Trustee's Motion to Withdraw by Erwin & Erwin a Professional Corporation

6/4/85 REQUEST for Oral Ar gument (APPEAL)

6/4/85 AFFIDAVIT of Charles Robinowitz (APPEAL)

6/4/85 AFFIDAVIT of Beverly A.Camp (APPEAL)

6/4/85 AFFIDAVIT of Yvonne Walden (APPEAL)

6/4/85 AFFIDAVIT of Dolores Woodward (APPEAL)

6/4/85 AFFIDAVIT of Mary Seabeck (APPEAL)

6/11/85 Opposition to Resignation of Trustee or in the Alternative for Conditional Resignation (pro pria persona and atty for Mullennex)

6/13/85 ORDER deeming appeal timely filed as of May 20, 1985
cc: Erwin, Erwin, Durkheimer, card to Robinowitz

6/13/85 RESPONSE to Motion for Extension of Time Within Which to File Notice of Appeal by Erwin & Erwin,a Professional corporation (APPEAL)

6/13/85 Memorandum (Atty for Trustee)

6/13/85 RESPONSE to Motion for Extension of Time Within Which to File Notice of Appeal by Erwin & Erwin, a Professional corporation (APPEAL)

6/13/85 Excerpt of Proceedings of May 6, 1985 - see separate transcript

file

6/13/85 Applic. of trustee for Appointment of Special Attorney - Charles Robinowitz Atty.

6/13/85 Affidavit of Charles Robinowitz in support of applic. of trustee for appt. of attorney

6/13/85 ORDER Authorizing Employment of Attorney by trustee-Charles Robinowitz, Atty.

VOL. 7 JUN 14 1985 Rule 2015 Report of Debtor-in-Possession for the period of 4/10/85 thru 5/10/85

6/17/85 Partial Transcript of Proceedings -=Apr. 2, 1985 at 9:30 a. m. See separate transcript file

6/25/85 Response to Amended Objection to Claim of Erwin and Mullennex

6/24/85 Supplemental Memorandum re appeal to District Court

7/3/85 Susan Brewer's Memorandum on Issue of Standing re appeal to

7/16/85 DC ORDER that creditor Suzan Brewer's motion for leave to appeal an order of the bankruptcy court allowing creditor Erwin & Erwin claim for legal fees against debtor Margquam Investment Corp. is DENIED (James A. Redden)
cc: Robinowitz, Erwin

JUL 18 1985 Rule 2015 Report of Debtor-In-Possession for the period of 5/10/85 thru 6/10/85

8/1/85 Preliminary hrg to deterine amount of claim of Lawrence Erwin - Tue. Aug. 22, 1985 at 10:30 a.m.

8/1/85 Preliminary hrg to determine amount of claim of Erwin & Erwin-Mon. Aug. 26, 1985 at 10:30 a.m.

8/1/85 Preliminary hrg on loan claims and indemnification of claims of Lavelle Mullennex and Warde Erwin

- Thurs. Aug. 29, 1985 at 10:30 a.m.

8/1/85 Preliinary hrg on wage claim of Lavelle Mullennex - Tue. Sept. 3, 1985 at 1:30 p.m.

8/13/85 Hrg to determine claim of Erwin & Erwin - Mon. Aug. 26, 1985 at 10:30 a.m. via tele. conf. is CANCELLED

Hrg to determine claim of L. Erwin set for Thurs. Aug. 22, 1985, at 10:30 a.m. via tele. conf. is CANCELLED

VOL. 8

AUG 14 1985 Rule 2015 Report of Debtor-In Possession for the period Ending 8/10/85

8/16/85 Hrg set Thurs. Sept. 19, 1985 at 1:30 p.m. on the following motions: (1) motion disqualify Erwin & Erwin (2) det. claim of L. Erwin (3) det. claim of Erwin &

Erwin

AUG 19 1985 ???? Re Addition to Matrix

8/19/85 Hrg set for Thurs. Sept. 1985 at 10:30 a.m. Ctrm #2: (1) determination of amount of claim of Erwin & Erwin (2) determination of account of claim of Lawrence Erwin (3) motion to disqualify Erwin & Erwin

9/5/85 Applic.of debtor to Make Disbursement from Rental Incomes and Order THEREON

9/5/85 AMENDED DISCLOSURE STATEMENT fld by debtor

9//5/85 NOTICE OF HEARING ON) Mon. Sept. 30, 1985 at 9:00 a.m. Ctrm #1 PROPOSED CHAPTER 11) Objections by 9/23/85 DISCLOSURE STATEMENT) (certificate of mailing)

9/16/85 NOTICE RE; CHANGE OF DATE) Disclosure statement hearing changed FOR HEARING ON PROPOSED

CHAPTER 11 DISCLOSURE STATEMENT
from 9/30/85 to Mon. Oct. 7, 1985
at 1:30 p.m. Ctrm #2

SEP 17 1985 Rule 2015 Report of Debtor-In -Possession for the period of 8-10 to 9/10/85

9/23/85 Suzan Brewer's Objections to Amended Disclsoure Statement

OCT -2 1985 Rule 2015 Report of Debtor-In -Possession for the month of 9-10 to 10-1-85

10/7/85 PLAN OF REORGANIZATION fld by Suzan Brewer

10/8/85 Motion of Suzan Brewer to Require Trustee to Sell Real Properrty

10/17/85 OPPOSITION TO MOTION TO REQUIRE TRUSTEE TO SELL REAL PROPERTY (Debtor)

10/7/85 MOTION FOR ORDER TO ALLOW PAYMENT OFADMINISTRATIVE EXPENSE AND ORDER THEREON (228.40 to Yamhill Tree Farms) (eod 10/18/85 rb)

10/10/85 ORDER RE: BREWER'S OBJECTIONS TO AMOUNT OF CLAIM OF ERWIN & ERWIN P.C. (eod 10/18/85 rb) to NUNC PRO TUNC: September 18, 1985 (eod 10/18/85

11/18/85 Motion of Suzan Brewer to Extend Discovery Deadline re: objection to claim of Erwin & Erwin

11/26/85 Argument of Erwin & Erwin, A Professional Corporation

11/26/85 Affidavit of Charles C. Erwin in support of Argument of Erwin & Erwin

12/9/85 Correspondence Re: Change of Address for Creditor

12/6/85 Hrg on (1) Motion to sell real property; and (2) motion to extend discovery deadline- Thurs. Dec. 12, 1985 at 1:30 p.m. (no location shown)

12/6/85 Trial on amount of claim of Lawrence Erwin, P.C. set Mon. Feb.

3, 1986 at 9:00 a.m. Ctm #2; Trial on claim of Erwin & Erwin, P.C. set Mon. Feb. 3, 1986 at 10:30 a.m. and Teu, Feb.4, 1986 at 9:00 a.m.Both scheduled in Ctm #2

VOL. 9

12/10/85 Second Amended Objections of Suzan Brewer to Claim of Law office of Lawrence W. Erwin, P.C.

12/13/85 EXCERPT of Proceeding (Partial trans of testimony of Michael Marcus) of April 2, 1985 (H) See separate transcript file- Vol 2

12/17/85 ORDER Denying Motion to Require Trustee to Sell Real Property

12/17/85 ORDER Denying Motion to Extend Discovery Deadline

12/19/85 Motion of Lawrence W. Erwin, P.C. to Strike Second Amended

	Objections to Claim of Law Office of Lawrence W. Erwin, P.C.
1/9/86	Answer to Law Office of Lawrence W. Erwin, P.C.'s Motion to Strike fld by Suzan Brewer
1/15/86	Certificate of Service - Subpoena to Witness - Records Custodian, Multnomah City Assessors's Office
1/14/86	Correspondence Re: Change of Address for Creditor
1/29/86	ORDER (re 2nd Amended OBJ. to claim filed by Suzan Brewer - Motion to strike) (Motion to Strike "B","C" "D," "E" and "FP allowed; and "A" amd"G" in Brewers Second Amend Obj. will be heard Feb. 3, 1986)
1/30/86	ORDER -The Proof of Claim of Mullennex for wages is disallowed as a claim E

2/5/86 CERTIFICATION of Service (Subpoena to Witness) (Martin)

2/13/86 Memorandum Re: Indemnity of Warde H. Erwin and Lavelle Mullennex

2/25/86 ORDER Re Objection to Claims of Warde H. Erwin and Lavelle Mullennex Allowed as follows: Mullennex Indemnity $4,711.00; Erwin Indemnity 24,724.00

2/25/86 ORDER Re Objection to Claim of Law Office of Lawrence W. Erwin, P.C. by Suzan Brewer (Allowed in amount of $9,269.18)

3/3/86 NOTICE OF APPEAL an order of 2/25/86 re Claims of Erwin & Mullennex

3/4/86 NOTICE OF REFERRAL TO BAP #1 OR 861185,D.C.Fee Paid 861523

3/4/86 E TRANSMISSAL FORM Judg DC

Affirmed 6/23/8 9th Cir

3/3/86 NOTICE OF APPEAL on order of 2/25/86 Re Claim of Law office Lawrence W. Erwin

3/4/86 E NOTICE OF REFERRAL TO BAP #2 Gr 86-1185 D.C.5 Fee Paid 86-1523

TRANSMITTAL FORM Judg DC Affirmed 6/23/?8 9th Circuit

3/3/86 NOTICE OF APPEAL on order of 2/25/86 re Claim of Law office Lawrence W. Erwin

3/4/86 NOTICE OF REFERRAL TO BAP #2 GR 86-1186 D.C. Fee Paid 87-74

3/4/86 TRANSMITTAL FORM Mandate USDC Affirmed 6/23/88 9th Cir.

3/4/86 Corres from Judge re hearing set for 4/25/86: Objections to Exhibit A Supplemental to be filed by 4/1/86 (see letter for details re any extensions

of deadlines)

3/7/86 APPEAL Motion to Dismiss appeal #1 by appellee and MOTION for ATTY FEES FOR FRIVOLOUS APPEAL

3/18/86 MEMORANDUM in Support of Request for Atty Fees Rule 11, Rule 9011 and 28 USC 1927 APPEAL #L & STATEMENT of Fees Requested

3/18/86 MEMORANDUM in Support of Motion to Refuse to Hear Interlocutory Appeal #1

?/?8/86 Brewer's RESPONSE to Creditor's Motion to Dismiss Appeal #1 (origin BAP sl)

?/??/86 Brewer's RESPONSE to Creditor's Motion to Dismiss Appeal #2

3/24/86 NOTIFICATION of Ordering of Transcript on Appeal #1

3/24/86 DESIGNATION OF RECORD and Statement of Issues #1

3/31/86 Correspondence Re: Attorney's Change of Address

3/31/86 Motion to Dismiss Appeal & Motion for Atty Fees (Second) #2

4/1/86 Trustee's and Brewer's Motion to Strike Based on Statute of Limitations

4/1/86 Trustee's and Brewer's Motion for Attorney's Fees and Costs

VOL. 10

4/1/86 Objections of Trustee and Brewer to Claim of Erwin & Erwin, P.C.

4/1/86 Memorandum of Law re Statute of Limitations eod 4/15/86

4/1/86 Affidavit of Charles Robinowitz eod 4/15/86

4/3/86 Motion to Require Plaintiff or His Attorney, or Both to Pay Reasonable Expenses (Lamb & Erwin)

4/3/86 Motion to Require Plaintiff or His Attorney, or Both to Pay

Reasonable Expenses (Erwin & Mullennex)

*4/7/86 (see below docketing re Appeal #2)

3/10/86 Corresp re: Correction to objections to Supplemental Exhibit of Erwin & Erwin

5/5/86 Response to Motion to Strike BA sed on Statute of Limitations EOD 5/13/ 86

5/5/86 Response to Motions to Strike and Make Definie EOD 5/13/86

5/22/86 Trustee's and Brewer's reply Regarding Statute of Limitations Defense

5/30/86 Response to Trustee's and Brewer's Reply Regarding Statute of Limitations Defense

7/7/86 Objection to Determination of Fact Regarding Statutue of Limitations (Atty for Trustee and Brewer)

1986 DOCKET NO. 383 01488 (Page 6 of

8/18/86 (4/21/86) ORDER DENYING MOTION OF APPELLEE TO DISMISS APPEAL or 861185 & TO GRANT ATTY FEES (Judge Frye) Appeal #1

======= (Appeal filed & docketed #1 on 8/25/86)

*4/7/86 Brewer's Answer to Creditor's Second Motion to Dismiss (Appeal #2)

4/7/86 Affidavit of Charles Robinowitz (Appeal #2)

4/7/86 Affidavit of Berverly A. Camp (Appeal #2)

8/28/86 Corres: requesting deferral of ruling on motion for judgment until Irwin responds to second ~~amended complaint~~ ($85-013122)??

See page Sic (6)

10/28/86 Filed and docketed for District Court. Briefing schedule pursuant to Rule 8009 (Approx

transmittal is January 21, 1987)

SEPT. 2 1) ORDER that this case is assigned to Judge FRYE n/b

19 2) ORDER that creditor's (Law Office of Lawrence W. Erwin, P.C.) mo to dismiss id DENIED. Motion for Attory fees is DENIED (FR) 9/8/86

23 3) ORDER-IT IS HEREBY ORDERED that the bankruptcu court's ord of July 24, 1986 dismissing the second claim for relief is AFFIRMED. (ntfd) e/m 9-30-86 S/9-29-86 RMC

29 4) JUDGMENT-IT IS HEREBY ORDERED & ADJUDGED that the decision of the Bankruptcy Judge is affirmed. (ntfd) e/m 9-30-86 S/9-29-86 RMC

10/22/86 TRANSCRIPT (PARTIAL) OF Proceedings February 3, 1986 (in Appeal) #2) D.C.

10/31/86 Application to Employ Attorney and Atty Certification & ORDER THEREON nunc pro tunc 10/21/86

1/26/86 Motion to Dispense with Monthly Rule 2015 Reports and Substituted Monthly Affidavits and ORDER

???? Hrg on amt of claim of Erwin & Erwin - Mon. Mar 3, 1987 and Tues, Ma 10, 1987 at 9:00 a.m. Ctrm #2

??????? ?/29/87 Hrg to Determine amount of claim of Erwin & Erwin Claim set for 3/9/87 & 3/10/87 RESET to 10:00 a.m. Mar 27, 1987 at 9:00 a.m. and April 3, 1987 at 9:00 a.m. Ctrm #2

?/2/87 Hrg to Determine amt of claim of Erwin & Erwin, Claim set for 3/27/87 & 3/30/87 RESET to Apr 2, 1987 at 9:00 a.m. and April 3, 1987 at 9:00 a.m. Ctrm #2

~~?/12/87 Hrg on obec, etc. set 3/27/87~~
~~RESET to Apr 27, 1987 at 9:30~~
~~a.m. CTrm #2~~ ??docket ??

?/13/87 Hrg set Wed, 4/2/87 OFF:Hrg begin Fri, Apr 3, 1987 and if not concluded, then Tues. Apr 7 at 9:30 a.m. set aside to complete hrg.

4/2/87 Motion for Continuance/Affidavit of Charles Robinowitz

4/3/87 Hrg to determine amt of claim of Erwin & Erwin set 4/8/87- OFF /Hrg to determine amt of Claim of Erwin & Erwin - May 18, 1987 at 9:00 a.m. Ctrm #2 /cont'd hrg to determine amt of claim of Erwin & Erwin - May 26 1987 at 9:00 a.m. Ctrm ?

~~6/5 /87 Affidavit of Lavelle Mullennex~~
nbs

???? Corresp from Charles Robinowitz' conrfirming hrg on May 18, 1987

and May 2?

5/28/87 Adj hrg on Claim of Erwin & Erwin - Jun 5, 1987 at 1:30 p.m. Ctrm #2

6/9/87 Closing argument re E & E Claims =-Jun 16, 1987 at 2:00 p.m. Ctr

~~6/8/87 Supplemental Affidavit of Fourth Claim for Relief, Count II~~ M?????nsw ????

6/9/87 Closing argument re E & E =-Jun 16, 1987 at 2:00 p.m. Crtrm #2

6/11/87 Affidavit of Lavelle Mullennex

7/2/87 AMENDED DISCLOSURE STATEMENT/ 6-30-87 Submitted by Debtor

7/2/87 PLAN OF REORGANIZATION 6-30-87 Submitted by Debtor

7/2/87 NOTICE OF HEARING ON)Aug 3, 1987 at 1:30 p.m.m Ctrm #2 PROPOSED CHAPTER 11) Written objections: 7/27/87 DISCLOSURE STATEMENT)

VOL 11

7/24/87 Objection of Trustee to Disclosure Statement

7/24/87 Objection of Suzan Brewer to Dislcosure Statement

7/31/87 Response of debtor to Objections to Disclosure Statement of Trustee

8/4/87 ORDER APPROVING DISCLOSURE STATEMENT AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN; AND NOTICE OF CONFIRMATION HRG) Sept. 21, 1987 at 1:30 p.m. Ctrm #2 Written objections/ballots: 9/2/87

8/13/87 PLAN OF REORGANIZATION 8/13/87 BY SUZAN BREWER, A CREDITOR

9/4/87 Ballot Summary

10/23/86 Filed and docketed for District Court. Briefing schedule pursuant to Rule 8009 (Approx transmittal is January 21, 1987)

12/2/86 Appellant's Brief

12/2/86 Appellant's Excerpt of Record

12/2/86 Appellee's Brief

1/5/87 Applt's Reply Brf

1987

JAN. 23 1) ORDER that this case is assigned to Judge Frye n/b CMC.

FEB. 27 2) ORDER-CONCLUSION- IT IS HEREBY ORDERED & ADJUDGED that the ord of the Bnakruptcy court allowing the claims of Lawrence Erwin in full is REVERSED IN PART & AFFIRMED IN PART. The claim by Lawrence Erwin for reasonable attys fees is REMANDED for further consideration by the bankruptcy court not inconsistent with this opinion. (ntfd) e/2/27/87 S/2-27-87 FR.

27 3) JUDGMENT- IT IS HEREBY ORDERED & ADJUDGED that the ord

of the Bankruptcy court allowing the claims of Lawrence Erwin in full is REVERSED IN PART & affirmed in part. The claim by Lawrence Erwin fro reasonable attys fees is REMANDED for further consideration by the bankruptcy court not inconsistent with this opinion. (ntfd) e/2/27/87 S/2-27-87 FR

MAR 9 4) Mot for recosideration, memo

9 5) REC OF ORD- setting appellant's mot for reconsideration on Judge Frye's M/C 4-13087, NOA. n/b FR. FR(MC4-13-87) ntfd

16 6) Creditor, Law Office of Lawrence W. Erwin, P.C. -Re ponse to mot for reconsideration. c/ FR.

19 7) Request for expedited determination of appellant's mot for reconsideration C/FR.

20 8) REC OF ORD- granting exp. consideration. ORD-striking if from the M/C 4-13-87. ORD-denying appellant's mot for reconsideration. n/b FR.

26 9) NOTICE OF CROCSS APPEAL BY SUSAN BREWER- Notc is hereby given that Susan Brewer, objector, cross appeals to the U.S. Court for the 9TH CIRCUIT from the order and jdgmnt of the U.S.D.C.for the District of Oregon 2-27-87.

26 (()$5.00 USDC filing fee pd., $65.00 C?A filing fee pd.

26 (()Mailed Notc of Appeal to C?A and Cnsl.

27 10) NOTICE OF APPEAL by Law office of Lawrence W.Erwin, P.C. creditor above-named, appeals to the U. S. Court of Appeals for the Ninth Circuit from the ord

and jdgmnt of the U.S.D.C. for the District of Oregon entered in this action on the 27th day of February, 1987.

27 (() $5.00 USDC filing fee pd., $65.00 C/A filing fee pd.

27 (() Mailed Notc of Appeal to C?A and Cnsl.

APRIL 7 11)Transcript designation and Ord form-hrg 2-3-86 ordered. (Pltf-appellee)

8 12)/Transcript designation and Ord form -hrg 2-3-86 ordered. (Deft-appellant)

13 13)Transcript designation and Ordering form--hrg 2-3-86 ordered. (Deft-appellant)

20 14)Applt's designation of Clerk's Record

MAY 4 15)ORDER-exempting case from pre-briefing conf. program.

JULY 6 16) ORDER- Susan Brewer's mot fro

an ord req. creditor to file a supplemental excerpt of record is granted in part. Brewer's mot to delete the reporter's transcript from thr excerpt of record is referred to the panel that considers these appeals on their merits

9/9/87 Motion of Trustee and Suzan Brewer for stay and hearing to determine trustee's claims for indemnity and subordination (Oral argument Requested)

9/11/87 Hrgset 10-/13/87 RESET to Sept. 21, 1987 at 1:30 p.m. Ctrm #2

9/14/87 Application of Debtor for Cram-down - Confirmation of Plan

9/14/87 Motion of Suzan Brewer to Allow Objections of Brewer to Debtor's Plan of Reorganization and to Allow Inspection of Debtor's Real Property (Request for Oral

Argument)

9/14/87 Brewer's Objections to Proposed Reorganization Plan

9/25/87 Certificate of Service - Subpoena to Witness - Records Custodian, Wells-Reed-Wood et al

10/13/87 Corres. re hearing on various motions RESET 10/13/87 to 12/22/87 9:00 a.-12:00 Noon - Ctrm. #2

9/28/87 Correspondence Re: Attorney for Debtor's Change of Address (eod 10/14/87)

10/26/87 Motion for Debtor for ORder to Fix Time in Which to Submit Administrative Claims, Claims for Attorneys' fees

10/23/87 ORDER Fixing Time in which to submit Administrative claims.

11/5/87 Affidavit of Service of Order fixint time in which to submit Administrative

11/20/87 Motion of Charles Robinowitz for Attorney's Fees and Costs/ Affidavit of Charles Robinowitz

VOL 12

11/20/87 Motion of Charles Robinowitz for Attorney's Fees and Costs/ Affidavit of Charles Robinowitz

11/20/87 Objection of Suzan Brewer to Fees of Lawrence W. Erwin

11/20/87 Motion of Trustee and Brewer for Stay of Confirmation Order

11/20/87 Notice of Substitution of Representation-Janet M. Briggs

12/1/87 Hrg on Motion for Stay of Conafirmation Order, the Motion for Atty Fees and Costs (Lawerence Erwin), Motion for Atty's Fees and Costs (WArde Erwin) and Objections to fees of Lawrence W. Erwin, Dec. 22, 1987 at 9:00 a.m. Ctrm #2

12/10/87 Response to Application for

Fees for Charles Robinowitz (Claims of L. Mullennex and W. Erwin)

12/10/87 Objection to Claims of John Durkheimer's Employment Application

12/10/87 Objection to Claim of Benj. Franklin Federal Savings & Loan Association

12/11/87 Opposition to Petition for Allowance of Attorneys' Fees of Bogle & Gates - Neihaus, Murphy - Jament M. Briggs

12/11/87 Opposition to Motion for Stay of Confirmation ORder and to Fix Supersedeas Bond of $175,000

12/11/87 Opposition to Motions for Attorneys' Fees and Costs of Charles Robinowitz, Attorney for Suzan Brewer

12/11/87 Opposition to Application for

Allowance of Trustee's fees and Reimbursement of Expenses

12/11/87 Objection to Application for Attorneys' Fees of sussman, Shank, Wapnick, Caplan 7 Stiles, John H. Durkheimer

12/10/87 Opposition of Certain Creditors to Application for Stay During Appeal

12/11/87 Answer to Request for Fees & Costs of Charles Robinowitz

12/18/87 Affidavit of John H. Durkheimer

12/18/87 Response to Objections to Application for Attorneys' fees

12/18/87 Response to Objection to Application for Rees of John B. Franzwa

12/30/87 ORDER Granting Motion to Continue Hearing on Requests for Sanctions and Motion to Admit Attorney Pro Hoc Vica

DEC. 30 ()) ORDER (from C/A) - John B. Franzwa, Inc., and Susan Brewer's mot to consolidate appeals 86-4386, 87-3674 & 87-3690, and 87-3754 for hrg is GRANTED. Appeal 86-4386 is removed from the Portland Calendar for 1/6/88, and will be rescheduled with cross appeals 87-3674 & 87-3690 and 87-3753 & 87-3754, on the next available Portland Calendar.

1988

JUN 23 ()) MANDATE USDC affirmed (87-3753,87 3754 C/A), memo (not for publication)

MAR 31 88 NOTICE; ALL DOCKET ENTRIES AFTER THIS ENTRY ARE ELECTRONCIALLY DOCKETED ON BANCAP ?

Filing Date	Judge	Dist Off	Yr	No
05 0488	A 217 Hess	0979 3	83	01488-H

PLAINTIFFS	DEFENDANTS cv 88 816 MA
MARQUAM INVESTMENT CORP.	CHARLES ROBINOWITZ
Debtor-Appellant	Appellee

CAUSE APPEAL #1

APPEAL TO DISTRICT COURT from an ORDER of March 25, 1988 allowing administrative expense (Charles Robinowitz), MARQUAM INVESTMENT CORP., Case #383-01488-H11

ATTORNEYS

Lawrence W. Erwin	Charles Robinowitz aa 30
Babb, Avedovech & Erwin	1211 S.W. Fifth Avenue #2962
P. O. Box 8, 315 N.W. Greenwood	Portland, Oregon 97204
(503) 389-1010	(503) 226 1474
Atty. for Debtor/Appellant Marquam Investment Corp.	Appellee & Atty. for creitor Suzan Brewer & trustee John B. Franzwa, Inc.
Charles Erwin(B)66	John D. Durkheimer aa"
3323 S.W. Harbor	Sussman, Shank,Wapnick

Drive	et al
Portland, Oregon	1111 Orbanco Building
(503) 226-4525	1001 S.W. Fifth Avenue
Atty. for creditor Lavelle Mullennex, Warde H. Erwin, & Erwin & Erwin, PC	Portland, Oregon 97204 (503 227-1111 Atty./ for John B. Franzwa

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3/25/88	Order Denying Application for Administrative Expenses (Benj. Franklin)
3/25/88	ORDER Allowing Administrative Expenses (Trustee)
3/25/88	ORDER Allowiing Administrative Expense (Babb, Avedovich & ERwin) Appeal (See Adv. po 85 131 Affirmed
3/25/88	ORDER Allowing Administrative Expense (Sussman, Shank)
3/25/88	ORDER Allowing Claim of Erwin & Erwin Appeal
3/25/88	ORDER Allowing Administrative

Expense (Charles Robinowitz)
Appeal 88-816-MN - Reversed

3/25/88 Conditional ORDER Granting Stay of Confirmation Order

3/25/88 ORDER Confirming Plan Appeal

3/31/88 Notice of ORDER Confirming Chapter 11 Plan and Discharge

4/04/88 (1) NOTICE OF APPEAL of Order of 3/25/88 Allowing Adm. Exp of Robinowitz DC 88 816 MA
DC Reversed 10/14/88

4/06/88 (2) NOTICE OF REFERRAL of Appeal to BAP

4/6/88 (3) Corres: re Rule 806 & ordering of transcript

4/14/88 (4) Appellant's Designation of Contents of Record and Statement of Issues on Appeal

4/14/88 (5) Notification of Ordering of Transcript on Appeal

4/14/88 (6) Objection to Referral to Bankruptcy Appellate Panel

5/3/88 (7) EXCERPT TRANSCRIPT OF PROCEEDINGS, December 22, 1987 (Hearing on Miscellaneous Motions) on Adv. #85-0131-H (in appeal file)

---- -- -- Appeal eod 4/4/88 from order of 3/25/88 filed & docketed for District Court on 5/4/88 (approx transmittal 7/28/88)

6-30-88 ORDER re: Susan Brewer and the trustee agree to dismiss all of their pending claims for sanctions against Erwin & Erwin,P.C., Warde Erwin and Lavelle Mullenex with prejudice and without costs

----- ----APPEAL from order of 3/25/88 transmitted to DC on 7/20/88 (MA)#10/12/88 Affidavit of Lavelle Mullennes for September 1988 (See 2015 Rep)

10/24/88 Statement of Costs and Disb.(US
VOL 13 District No. 88-816

2/13/89 TRANSCRIPT OF PROCEEDINGS, May 6, 1985 (to DC 5/3/89)

VOL 14 - - - - - - - - - - - - - - - - - -

3-10-89 Application by Trustee, John B. Franzwa, to Employ Leasing Agency and ORDER Thereon; and Notice of Intent to Compensate Agency (Served: MAR 14 1989)

5/4/88 (8) Appeal filed and docketed for District Court, Briefing Schedule

6/03/88 (9) BRIEF FOR APPELLANT

6/03/88 (10) APPELLANT'S EXCERPT OF RECORD

7/05/88 (11) APPELLEE'S BRIEF

7/05/88 (12) APPELLEE'S SUPPLEMENTAL EXCERPT OF RECORD

JUL 22 13) NOTC OF ASSIGNMT to MA CMC a/b

28 14) REc of ord: setting hrg on appeal from 3/24/88 ord allow-

ing administrative expenses before Judge M Marsh thursday 8/11/88 at 1:30 pm. MA n/b

AUG 4 15) Appellee's response to supplemental authority.

8 16) Rec of ord: resetting Thursday, 8/11/88 time for hrg appeal from 3/24/88 ord allowing administrative expenses from 1:30 to 4:00 pm. MA n/b

19 17) Rec of ord restting hrg on appeal from 3/24/88 ord allowing admin expense before Judge Marsh Wed 10/12/88 at 9 am. MA ntfd <MC 10/12/ 88>

10/12/88 18 Rec of h rg: J.Hess's order allowing administrative expenses is REVERSED. The Court grants attorney Robinowitz leave to resubmit administrative expenses petion to Judge Hess under the correct statu-

tory provision. MARSH

10/14/88 19 JUDGMENT. IT IS ORDERED AND ADJUDGED Judge Hess's order allowing administrative expenses petition to Judge Hess under the correct statutory provision. MARSH

10/ 24/88 20 STATEMENT OF COSTS AND DISBURSEMENTS

11/01/88 21 OBJECTION TO COST BILL

U. S. Bankruptcy Court

District of Oregon (Portland)

Bankruptcy Petition #: 83-31488

Date filed: 5/4/83

Assigned to: Judge Henry L. Hess, Jr

Cahpter 7 voluntary

==========*Attorneys*

MARQUAM INVESTMENT CORP. LAWRENCE W. ERWIN

3323 SW HARBOR DR POB 8

PORTLAND, OR 97201 BEND, OR 97709

SSN: 930478481 389-1010

*Debtor *

JOHN B FRANZWA, Trustee
7425 SW Chapel Ct
Portland, OR 97223
Trustee

JOHN H DURKHEIMER
520 SW YAMHILL #800
PORTLAND,OR 97204
226 6151

JEROME B SHANK
1000 SW BROADWAY
#1400
PORTLAND,OR 97205
227-1111

Proceedings include events between 1/1/1 and 4/17/92

4/1/89 -- ****SEE VOLUME 14 ****(pdr)
<EOD 04/25/89)

4/27/89 1 Transcript of Hearing held on April 12, 1985 re claims (eal)

9/12/89 2 MOTION by Debtor MARQUAM INVESTMENT CORP. for Relief From Stay and To Amend Plan by MARQUAM INVESTMENT CORP. . (nb)
<EOD 09/23/91>

9/19/91 3 Certificate of Service by

LAWRENCE W ERWIN for Debtor
MARQUAM INVESTMENT CORP. Of
<2-1> Motion for Relief From
Stay and to Amend Plan (nb)
<EOD 09/23/91)

Docket as of April 17, 1992 88:00 pm

Proceedings include events between 1/1/1 and 4/17/92.

83-31488 MARQUAM INVESTMENT CORP. V.

9/26/91 4 NOTICE of HEARING Re: <2-1> Motion for Relief From Stay and to Amend Plan by MARQUAM INVESTMENT CORP. Scheduled For 1:30 10/15/91 Via Telephone Conference (ckn)

10/7/91 5 JUDGMENT ORDER On Costs Erwin & Erwin PC) (pdr)

10/8/91 6 NO OF HEARING Re: <2-1> Motion For Relief From Stay and To Amend Plan by MARQUAM INVESTMENT CORP. Scheduled For

1:30 10/15/91 Via Telephone Conference (ckn)

10/16/91 7 ORDER - Dismissing Appeal by USDC Judge Redden (re: Order Confirming Plan entered 3/25/88 - Notice of Appeal filed 4/4/88) (ljh) <EOD 10/21/91>

10/23/91 - HEARING Re: <2-1> Motion for Relief from Stay and To Amend Plan by MARQUAM INVESTMENT CORP Sched For 2:30 11/4/91 at Courtroom #2, Portland (pdr)

10/23/91 8 Supplemental Exhibit By Debtor MARQUAM INVESTMENT CORP. In Support Of Motion to Terminate Stay and To Motion To Waive Further Disclosure Statement (nb) <EOD 10/25/91>

10/23/91 9 ORDER by USDC Judge Redden (CV 88-915-RE) - Order of Dismissal of Appeal (10/16/91) is set aside - matter is stayed

pending status letters by 11/15/91 - see also appeal file. (ljh) <EOD11/o1/91>

11/15/91 10 NOTICE of Sell Real Property <EOD 11/18/91>

11/15/91 11 MOTION By Debtor MARQUAM INVESTMENT CORP. for Authority to Sell Property Free and Clear of Liens and Notice of Hearing Thereon Hearing Scheduled for 1:45 12/1o/01 Via Telephone Conference (nb) <EOD 11/18/91>

11/22/91 12 OBJECTION By Creditor Suzan Brewer To Proposed Order Re <11-1> Motion to Sell Property Free and Clear of Liens by MARQUAM INVESTMENT CORP. (pdr) <EOD 11/25/91>

11/27/91 13 OBJECTION by Trustee John B Franzwa to <11-1> Motion to Sell Property Free and Clear

of Liens by MARQUAM INVESTMENT CORP. . (pdr)

11/27/91 14 OBJECTION by Creditor Suzan Brewer To <lo-1> Notice of Sale (nb) <EOD 11/29/91>

12/12/91 15 ORDER Setting Aside Confirmation Plan and Releasing Security to Charles Robinowitz by USDC Judge Redden (CV 88-915-RE) . (ljh) <EOD 12/30/91>

1/23/92 16 NOTICE of Intent to Sell Property (Lots 1, 2, 3, E 1/2 of 4 & 6 of Block 1128, Caruthers Addition, Multnomah County, OR) At Private Sale and Compensate Real Estate Broker (if ?Any) (pdr)

1/28/92 17 OBJECTION By Creditor Warde H. Erwin <16-1> Notice of Sale And Sale Of Property (pdr)

1/31/92 19 MEMORANDUM by Creditor Warde H. Erwin (pdr) <EOD 02/05/92>

2/3/92 18 OBJECTION by Debtor MARQUAM INVESTMENT CORP. to <16-1> Notice of Sale By Trustee (pdr)

2/4/92 20 OBJECTION By Creditor Warde H Erwin To Notice Of Hearing On Motion to Convert (pdr) <EOD 02/05/92><Edit date 02/05/92>

2/7/92 21 OBJECTION By Creditor Suzan Brewer To <16-1> Notice Of Sale Of The Property (pdr) <EOD 02/11/92>

2/7/92 -- ****SEE VOLUME 15****(pdr) <EOD 02/28/92>

2/13/92 22 NOTICE of Intent to Sell Property At Private Sale And Compensate Real Estate Broker (if any) (pdr)

2/24/92 23 NOTICE of Intent to Sell Pro-

perty At Private SAle And Compensate Real Estate Broker (if any) (nb)

2/25/92 24 OBJECTION By Creditor Lavelle Mullennex To <23-1> Sale Notice . (pdr) <EOD 2/28/92>

2/25/92 25 OBJECTION by Creditor Warde H Erwin To <23-1> Sale Notice (pdr) <EOD 02/28/92>

e

2/25/92 26 OBJECTION By Creditor Suzan Brewer To <23-1> Sale Notice (pdr) <EOD 02/28/92>

2/26/92 27 OBJECTION By Debor MARQUAM INVESTMENT CORP. To <23-1> Sale Notice (pdr) <EOD 02/28/92>

3/19/92 28 NOTICE OF HEARING Re: <27-1> Objections to Trustee's Notice of Intent to Sell Property by MARQUAM INVESTMENT CORP <26-1>Suzan Brewerr <25-1> Warde H Erwin <24-1>

Lavelle Mullennex Scheduled for 9:30 4/14/92 at Courtroom #2, Portland (ckn)

3/24/92 29 ORDER Withdrawing, Converting to 7, And Remanding To Bankruptcy Court (Signed by District Judge James A Redden) (pdr) <EOD 03/27/92>

3/27/92 30 Notice of ORDER <29-1> Converting A Chapter 11 Case To A Case Under Chapter 7; ORDER Re: Document Filing; Trustee Appointment (John B Franzwa Inc). Conversion Documents Due: 4/8/92;; Show Cause Hearing: 4/21/92 10:30 am Courtroom #2. (pdr)

3/27/92 31 OPINION by USDC Judge Redden, Re: Withdrawal of Reference Conversion (CV 88-915-RE) (ljh) <EOD 03/31/92>

Docket as of April 17, 1992 8:00 p.m.

Page 3

Proceedings include events between 1/1/1 and 4/17//92.

833-313488 MARQUAM INVESTMENT CORP. v

4/1/92 32 Application By Trustee John B Franzwa To Re-Employ Real Estate Agent, Realty Group Inc on basis previously approved AND ORDER THEREON (sl)

4/1/92 33 APPLICATION AND ORDER THERE-ON. Moation By Trustee John B Franzwa, To Shorten Notice Time to 7 days (sl)

4/2/92 34 NOTICE of Offers Received Prior to Conversion of Case from one under Ahpter 11 to Chapter 7 and Intended Private Auction. Service Date: 4/1/92 (7 days objection) (sl)

4/7/92 35 Affidavit for February 1992.

Filed by Lavelle Mullennex, Secretary of the Debtor Corporation (sl)

4/8/92 36 MOTION Aby Creditor Warde H Erwin Regarding Order filed March 27, 1992 (sl) <EOD 04/14/92>

4/14/92 37 Application By Trustee John B Franzwa To Employ Attorney Jerome B ShankAttorney Certification AND ORDER THEREON (sl)

8/25/86 Filed and docketed for District Court pursuant to Rule 8009 (Forward to District Court on November 21, 1986)

9/24/86 MOTION for Extension of Time To File Brif and ORDER 10/25/86)

10/1/86 TRANSCRIPT of hearing of February 3, 1986 (Partial)

10/28/86 Appellant's Brief

11/14/86 Appellee's Brief

11/14/86 Appellant's Reply Brief

12/3/86 1) Note of asgnmt to Judge Frye per CMC ntfd

1/20/87 2) AORDER-ORD that the ord of the bktcy ct allowing the clms of Erwin & Mullennex is REVERSED. The appellant's req for atty's fees is DENIED. This matter is remanded to the bktcy ct for further proceedings. s FR 1/30/87 e/m 2/3/87 ntfd

2/2/87 3) JUDGMENT_ORD that this

action is remanded to the bktcy ct for further proceedings. s FR 2/2/87 e/m 2/3/87 ntfd

2/17/87 4) Notc of appeal by DEfts Erwin and mullennex from Judgment of 2/2/87

()) $70.00 fee pd receipt #55925

2/19/87 5) T/P Design by appellant (2/3/86)

2/24/87 ()) Cert of record mailed to C/A & all cnsl

3/4/87 ()) Notc of Cross Appeal by Brewer

3//4/87 6)Mot of objector Susan Brewer to ext time for Brewer to file x-appeal (to FR)

3/4/87 7) Affid of Charlees Robinowitz (to FR)

3/5/87 8) Creditors' objns to Brewer's mot for ext of time to file x-appeal (c-FR)

3/5/87 9) Cert of svce by mail for #6

3/6/87 10) Rec of ord granting objector's mot to ext time for Brewer to file x-appeal till 3/18/87 FR ntfd

3/9/87 11) Notc of cross appeal by Brewwer from judgment 2/2/87

() $70.00 fee pd receipt #53630

() Notc of appeal mailed to C/A & cc to all cnsl

19 12) Designation of reporter's transcript (none)

25 () Cert of record mailed to CC/A & cc to all cnsl

4/9/87 13) ORDER EXEMPTING CASE FROM PREBRIEFING COMP PROGRAM

4/9/87 14) Appeallants design of record

JUNE 1 15) C/A ORD Suzan Brewer's mot x/ time to file ans brief & clarify brief shced granted. Brewer file 2nd brief on cross appeal 6/3/87. Erwin & Mullenex file reply ans

brief w/in 30 days from serv.

20 16) ORDER-Appellee's mot to require appelleants to suplmnt their excerpt of record to include a copy of their clm in the bktcy ct is granted. W/in 14 days from the entry of this ord, appellants shall file in this ct 5 copies of their clm C/A

DEC 30 17) ORDER-Mot to consolidate Adv 85-013) appeal 86-4386, 87-3674 , 87-3690, 87-3753 & 87-3754 is GRANTED. C/A

1988

JUNE 23 ()) MANDATE-ORD the judgment of the D.C. is affirmed C/A ntfd

92-668

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

Number ____

SUPREME COURT OF THE UNITED S'

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORA'

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs

ERWIN & ERWIN, Professional Corpo

Defendant-appellant

APPENDIX TO PETITION FOR CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

VOLUME II

Warde H. Erwin
Counsel of Record for Defendant-a

Address: 2110 SW Jefferson Street
Suite 100
Portland, Oregon 97201
Phone (503 226 4525

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201
Phone (503) 226 4525

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,)
)
Debtor,)
)

)
SUZAN BREWER,)
)
Plaintiff-appellee,)
)
vs.)
)
ERWIN & ERWIN, Professional Corporation,)
)
Defendant-appellant.)
)

CIVIL MINUTES U. S. DISTRICT COURT

BANKRUPTCY APPEAL, AND DISTRICT

COURT DOCKET ENTRIES

JUNE 1, 1988 TO APRIL 23, 1990

Warde H. Erwin
Counsel of Record for Defendant-appellant

Address: 2110 SW Jefferson Street
Portland, Oregon 97201

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201

INDEX

TO

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CIVIL MINUTES GENERAL

	Items:	Pages
1.	Entries 6-1-88 to 10-17-88	157 to 160
2.	Entries 7-14-89- to 10-18-89	160 to 163
4.	Entries 2-14-90 to 4-23-90	163 to 166

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CIVIL MINUTES - GENERAL

Case No. Bkcy #383-01488-H-11;

(Adv. #895-0131) Date June 1, 1988

Title In re: Marquam Investment; John Franzwa, Inc. v. Lavelle Mullennex, et al

DOCKET ENTRY

Record of hearing,

ORDERED that appellant's motion to sever is GRANTED. Further, the brief on appeal concerning Larry Erwin's fee is due 6/22/88, the response 7/2/88 and reply is due 8/5/88. The appellant is to confer with counsel and submit a proposed order concerning future scheduling. Finally, appellant is to file the required transcript by July 1, 1988.

PRESENT:

HON. JAMES A. REDDEN, JUDGE

Craig Meyer	Jerry Harris
Deputy Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Charles Robinowitz	Charles Erwin
	Larry Erwin

Proceedings:

ntfd

cc

Chambers (BH)

MINUTES FORM 11 — Initials of Deputy Clerk

BANKRUPTCY PROCEEDING RECORD

DATE	NR	
06/01/88	(20)	Rcd of hearing, ORDERED that appellant's motion to sever is GRANTED. Further, the brief on the appeal concerning Larry Erwin's fee is due 6/22/88, the response 7/22/88 and the reply is due 8/5/88. The appellant is to confer with counsel and submit a proposed order concerning future scheduling. Finally, appellant is to file the required transcript by July 1, 1988. ntfd
06/22/88	(21)	APPELLANT'S BRIEF
06/22/88	(22)	EXCERPT OF RECORD
07/08/88	(23)	Rec of ord: Attorney Charles Robinowitz's

		request for an extension of time to July 21, 1988 to file the transcript of the May 6-7, 1985 hearing is GRANTED ntfd
07/25/88	(24)	APPELLEE'S BRIEF
07/28/88	(25)	Rcd of ord: Pursuant to Mr. Charles Robinowitz's request, an additional two weeks,until August 4, 1988, to file the transcript. ntfd
08/05/88	(26)	APPELLANTS' REPLY BRIEF
AUGUST	27)	ORDER - This case is ASSIGNED TO JUDGE OWEN M. PANNER. nb CNSL/PA

10/13/88	28	OPINION PANNER (re: Bankruptcy court's award of travel expenses to law firm of Babb, Avedovech & Erwin)

10/13/88 29 ORDER - judgment of the Bankruptcy court is affirmed PANNER

10/13/88 30 JUDGMENT - IT IS ORDERED AND ADJUDGED the decision of the bankrutpcy court is AFFIRMED and this action is dismissed PANNER

Proceedings include all events. TERMED

3:88cv915 John B.Franzwa,Inc., et al. v. Mullennex, et al

8/12/88 31 MOTION by plaintiff Suzan -- Brewer to remand to reconstruct record (w/oa req) (dn) [Entry date 10/31/88]

8/12/88 32 Memorandum of plaintiff Suzan - Brewer in support of motion to remand to reconstruct record (w/oa

		req) [31-1] (dn) [Entry date 10/31/88]
10/13/88	28	Opinion Signed 10/13/88 Honorable Owen M. Panner (jp) [Entry date 10/14/88]
10/13/88	29	ORDER Judgment of Bkcy Crt Affirmed. ntfd Signed 10/13/88 micro-filmed 10/14/88 Honorable Owen M. Panner (jp) [Entry date 10/14/88]
10/17/88	30	JUDGMENT: the decision of the Bankruptcy Court is affirmed & this act is dism. [29-2] [28-1] ntfd, dismissing case Signed 10/17/88 Honorable M. Panner (te) [Entry date 10/18/88]
7/14/89	33	Stipulation and ORDER regarding briefing

schedule: IT IS HEREBY ORDERED that appeallant Suzan Brewer shall file her opening brief in or before 8/1/89, on the issue of Erwin & Erwin's entitlement to attorneys' fees; Erwin & Erwin shall fiel its response on or before 9/12/89; and the appeallant shall file her reply brief on or before 10/3/89 IT IS FURTHER ORDERED that a briefing schedule for all other issues now pending on appeal is deferred pending a decision on Erwin & Erwin's entitlement to attorney's fees. ntfd Signed 7/14/89 microfilmed & entered

		7/18/89 Honorable Owen M. Panner (dn) [Entry date 7/18/89]
8/1/89	34	Appellant's brief. (neal) [Entry date 8/2/89]
8/1/89	35	Appellant Excerpt of Record (neal) [Entry date 8/2/89]
8/28/89	36	Respondent's request for extension of time to file brief. (neal)
8/29/89	37	RECORD OF ORDER: granting respondents request for extension of time (36-1) to an including 9-30-89, to respond ntfd Honorable Owen M. Panner (neal)
9/28/89	38	Respondent's brief filed. (neal)
9/28/89	39	Respondent's excerpt of record- Volume I (neal)

9/28/89 40 Respondent's excerpt of record- Volume II (neal)

9/28/29 41 Respondent's excerpt of record- Volume III (neal)

10/2/89 42 RECORD OF ord granting appellant an ext of time to 10/18/89 to file his reply brief. ntfd Honorable Owen M. Panner (tely [Entry date 10/4/89]

Docket as of April 23, 1990 4:22 pm page2

3:88cv915 John B.Franzwa,Inc., et al v. Mullennex, et al.

Proceedings include all events. TERMED

10/18/89 43 Appellant's reply brief. (neal)

2/14/90 44 RECORD OF ord Case re-assigned to Honorable James A. Redden, ntfd. Honorable Owen M. Panner

		(tely) [Entry date 2/15/90]
3/8/90	45	OPINION The bankruptcy court's orders allowing Erwin & Erwin's claim for atty's fees are reversed. The case is remanded to the bankruptcy court for the entry of an order disallowing Erwin & Erwin's claim for atty's fees in its entirety. Signed 3/8/90 Honorable James A. Redden (clar) [Entry date 3/9/90]
3/8/90	46	ORDER The bankruptcy court's order allowing Erwin & Erwin's claim for atty's fees are reversed. The case is remanded to the bankruptcy court for the entry of an ord

		disallowing Erwin's claim for atty's fees in its entirety. Signed 3/8/90 Honorable James A. Redden (clar) [Entry date 3/9/90]
4/5/90	47	Notice of appeal by defendant Erwin & Erwin, P.C. from Dist. Court ord of 3/8/90 [46-1] (tely) [Entry date 4/6/90]
4/5/90	--	Received C/A fee of $: 100.00 D/C fee of $: 5.00 (Receipt # 88972) (tely) [Entry date 4/6/90]
4/5/90	--	Mailed copy of N/A to cnsal & to US Court of Appeals for the Ninth Circuit along with copy of ord and d/sheet.

		(tely) [Entry date 4/6/90]
4/18/90	48	Designation of record/ trial court file; entire transcript; exhibits (qsdr) [Entry date 4/19/90]
4/19/90	49	Certificate of Record Transmitted to US Court of Appeals for the Ninth Circuit/cnsl copied (qsdr)
4/23/90	--	Clerk's record on appeal transmitted to US Court of Appeals for the Ninth Circuit (tely)

Number_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor.

SUZAN BREWER,

Plaintiff/Appellee,

vs.

ERWIN & ERWIN, P.C.,

Defendant-Appellant.

GENERAL DOCKET

NINTH CIRCUIT COURT OF APPEALS

AS OF AUGUST 25, 1992

Warde H. Erwin
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TO GENERAL DOCKET

NINTH CIRCUIT COURT OF APPEALS

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1-6-91 to 10-3-91	181-184
3-4-92 to 8-25-92	184-189

GENERAL DOCKET FOR

Ninth Circuit Court of Appeals

Court of Appeals Docket

#: 0-35312 Filed: 4/26/90

Nsuit: 0

Brewer, et al v. Erwin & Erwin, P.C.

Appeal from District of Oregon (Portland)

- -

Case type information:

1) bankruptcy (DC)

2) District court (bkcy by way of

3)

- -

Lower court information

District: 0979-3 : CV-88-915RE

lead: 383-01488

court reporter: Jerry Harris

presiding judge: James A. Redden,

District Judge

Date Filed: 8/10/88

Date order/judment: 3/8/90

Date NOA filed: 4/5/90

PUBLISHER'S NOTE

ORIGINAL PAGINAT

Fee status: paid

- -

Prior cases:

None

Current cases:

None

- -

Panel Assignment:

Panel: ALA WJF CHH :PO 7/11/91 am

Date of decision: **/**/**

- -

Docket as of August 25, 1992 11:25 am

Page 1

Proceedings include all events.

90-35312 Brewer, et al v. Erwin &

Erwin, P.C.

In re: MARQUAM	No Appearance
INVESTMENT CORPORATION	[COR LD NTC ret]
Debtor	No address

ON IS NOT CONTINUOUS.

SUZAN BREWER
Plaintiff-
Appellee

Charles Robinowitz, Esq.
(503) 226-1464
[COR LD NTC ret]
1211 SW Fifth Avenue
2962 Pacwest Center
Portland, OR 97204

v.

ERWIN & ERWIN, P.C.
Defendant-
Appellant

Charles Erwin, Esq.
(503) 226-4525
Ste. 100
[COR LD NTC ret]
2110 SW Jefferson
Portland, OR 97201

Docket as of August 25, 1992 11:24 am

Proceedings include all events.

90-3532 Brewer, et al v. Erwin &
Erwin, P.C.

In re: MARQUAM INVESTMENT CORPORATION
Debtor

SUZAN BREWER

Plaintiff - Appellee

v.

ERWIN & ERWIN, P.C.

Defendant - Appellant

Docket as of August 25, 1992 11:25 am

Proceedings include all events.

90-35312 Brewer, et al v. Erwin & Erwin, P.C.

4/26/90 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. setting schedule as follows: CADS due 5/10/90 for Charles Erwin; court reporter shall file transcript in DC by 6/5/90 for Jerry Harris; certificate of record shall be filed by

6/12/90; appellant's opening brief is due 7/23/90 for Erwin & Erwin. P.C.; appellees' brief is due 8/21/90 for Suzan Brewer; appellants' reply brief is due 9/4/90 for Erwin & Erwin, P.C.; [90-35312] (dmf)

4/27/90 Filed certified transcript of record on appeal in three Volumes. Vol. 1 Pldgs (copy); Vols. 2 & 3 RTs (originals). (jr)

5/14/90 Filed Charles Erwin Civil Appeals Docketing Statement served on 5/10-90 (to CONFATT) [90-35312] [90-35312] (mt)

5/22/90 Filed certificate of record on appeal RT filed filed in DC none [90-35312] (ra)

6/8/90 Case released from Pre-Briefing Conference program. (tsp)

7/11/90 10 day oral extension by phone

of time to file Appellant brief. [90-35312] appellants' brief due 8/2/90; appellees' brief due 9/4/90' appellants' reply brief due 9/14/90; (ra)

8/2/90 Filed original and 16 copies aplt's opening brief (Informal: no) of 34 pages and five excerpts of record in 3 volumes; served on 8/1/90. [90-35312] (jr)

8/29/90 10 day oral extension by phone of time to file Appellee's brief. [90-35312] appellees' brief due 9/14/90; appellants' reply brief due 9/24/90; (ra)

9/17/90 Filed original and 15 copies appellee Suzan Brewer's 33 pages brief; served on 9/14/90 [90-35312] (dmf)

9/17/90 Received Appellee Suzan Brewer supplemental excerpts of record

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

PAGE 175

on appeal in 1 volumes. Copy to ProMo with motion to file oversize excerpts. (dmf)

9/28/90 Filed motion and deputy clerk order :(Deputy Clerk: ahh) Apple's motion to file supplemental excerpts in excess of 50 pages is denied. Apple has indicated in the motion that the documents contained in the supplemental excerpts were the subject of judicial notice in the district court and that a request for judicial notice is contained in apple's brief. Within 14 days of entry of this order, apple shall file an original and four copies of a motion for judicial notice of the above documents. Such motion and any related filings shall be referred to the merits

BEST AVAILABL

moot. The motion was denied on 9/28/90. Aple was instructed to move for judicial notice of the documents in question. Such motion and any related filings will be decided by the merits panel once the appeal has been assigned to a panel for disposition on the merits. The court, on own motion, extends time to file optional reply br, reply brief due 10/19/90. Aplt advised that motions to be submitted in orig + 4 copies, 9th Cir R. 27-1. Subject to recon....[wording edited] (Motion recvd 9/28/90) [90-35312] (mim)

10/15/90 Filed aplee's Request for Judicial Notice for referral to merits panel per order of 9/28/90. Served 10/11/90 *****

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PUBLISHER'S NOTE

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this appeal. Subject to reconsideration. [90-35312] (dmf)

11/5/90 Filed aple's response to request for judicial notice, referred to merits panel per order of 9/28/90. Served 10/25/90. ****** [90-35312] (dmf)

12/12/90 Filed order (Case Management Atty/Deputy Clerk: JN) aplt has not responded to this court's order of 10/23/90. Within 14 days of the entry of this order, the parties shall provide this court with proof that aple timely appealed from the bankruptcy court to the DC. This appeal will not be processed until a response to this order is received. Failure to respond may result in

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

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1/6/91 Calendar check performed [90-35312] (aw)

5/7/91 Calendar materials being prepared. [90-35312] [90-35312] (aw)

5/10/91 CALENDARED: PORTLAND July 12, 1991 9:00 am [90-35312] (aw)

6/20/91 Received Charles Erwin for Appellant Erwin & Erwin, P.C. letter dated 6/18 re "it would be helpful to know whether the Panel intends to hear argument upon the motion to consider materials not submitted to the trial court..."(PANEL) [90-35312] (jlc)

6/27/91 Filed order (Deputy Clerk: gb) the parties are ordered to file simultaneous supplementqal letter briefs of not more than 10 pages on or before 7/3/91, discussing the effect, if any,

on this appeal file on 4/4/88, of the DC's subsequent remand to the bankruptcy court of "John B. Franzwa, Inc. v. Erwin & Erwin, P.C. (In re Marquam Investment Corp.)" No. 88-114MA slip op. (D Or. 6/13/88) for a determination of the fair market value of Marquam's lease of office space to Erwin during the relevant time period. Specifically, the parties should discuss whether the remand of this issue rendered moot any of the issues presented in this appeal. (cite) [90-35312] (jlc)

7/2/91 Filed original and 2 copies of Appellant Erwin & Erwin, P.C. supplemental brief of 5 pages, served on 6/28/91 per order of

6/27/91 (PANEL) [90-35312] (mlm)

7/3/91 Filed fax copy Appellee Suzan Brewer supplemental brief of 3 pages, served on 7/3/91 (PANEL via fax) [90-35312] (mlm)

7/11/91 ARGUED AND SUBMITTED to Arthur L. ALARCON, Warren J. FERGUSON, Cynthia H. HALL [90-35312](mlm)

8/26/91 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Arthur L. ALARCON, author; Warren J. FERGUSON; Cynthia H. HALL.) FILED AND ENTERED JUDGMENT. [90-35312] (ck)

9/9/91 Filed Appellee Suzan Brewer bill of costs, served on 9/6/91 [90-35312] (jlc)

Docket as of August 25, 1992 11:25 am

Proceedings include all events.

90-35312 Brewer, et al v. Erwin & Erwin, P.C.

9/23/91 Filed Suzan Brewer motion to for attorney(s) fees in the amount of $5,058.75; w/supplementeal application form; served on 9/20/91.(placed in drawer pendin opposition) (jlc)

10/3/91 Filed Appellee Sizna Brewer reply regarding request for sanctions; served on 10/8/91. (PANEL) [90-35312] (jlc)

3/24/92 Filed published order & dissent (Arthr L. ALARCON, dissenting, Warren J. FERGUSON, Cynthia H. HALL); granting appellee's motion for attorneys' fees. It is ordered that the amount of $5,058.75 is awarded to the aples against the aplt Erwin &

Erwin, P.C... [90-35312] (jlc)

4/7/92 [2107321] Filed original and 40 copies Appellant Erwin & Erwin, P.C. petition for rehearing with suggestion for rehearing en banc (addressing 3/24/92 order) 15 p.pages, served on 4/6/92.(PANEL & ALL ACTIVE JUDGES [90-35312] (jlc)

4/9/92 Filed Appellant Erwin & Erwin, P.C.'s motion to file excerpts (to accompany en banc petition).(4/7)(PANEL) [90-35312] [90-35312] (jlc)

4/29/92 Rec'd. orig. & 40 addl. authority in support of Erwin & Erwin' motiion in arrest of judgment & recall of mandate. (4/27)(Shelved pending motion to recall the mandate) [90-35312] (jlc)

5/8/92 Rec'd. orig. & 40 copies addl.

authorities for motion to recall mandate.(LEAD JUDGE) (copies to casefile) [90-35312] (jlc)

7/22/92 Filed order (Arthur L. ALARCON): appellant's motion for an order permitting the filing of an excerpt is granted. [90-35312] (jlc)

Docket as of August 22, 1992 11:25 am
Page 7

Proceedings include all events.

90-35312 Brewer. et al v. Erwin & Erwin. P.C.

7/22/92 Filed order (Arthur L ALARCON): aplt's petition for relief from judgment pursuant to Rule 60 of the FRCP, for arrest of judgment, and for reconsideration

of the opinion of this court is denied. Aplt. Erwin & Erwin, P.C. is directed to pay a sanction of $2,500 plus interest until paid to the Clerk of this Court pursuant to Rule 38 of FRAP. Judge Alarcon votes against the imposition of a further sanction. [90-35312] (jlc)

7/28/92 Filed order (Arthur L. ALARCON): the order filed 7/22/92 directing aplt. Erwin & Erwin, P.C. to pay a sanction of $2,500 plus interest is hereby ordered vacated. [90-35312] (jlc)

8/5/92 Filed Appellant Erwin & Erwin, P.C. original & 40 supplemental excerpts of record on appeal in 1 volume to accompany petition for rehearing en banc per 7/22

order.(PANEL & ALL ACTIVE JUDGES) (jlc)

8/6/92 Received Appellant Erwin & Erwin, P.C. leter dated 8/3 re: pending petitions.(PANEL) [90-35312] (jlc)

8/10/92 Filed order (Arthur L. ALARCON, Waren J. FERGUSON, Cynthia H. HALL): Aplt's petition for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure for arrest of judgment and for reconsideration of the opinion of this court is denied. Aplt, Erwin & Erwin, P.C. is directed to pay a sanction of $2,500 pursuant to Rule 38 of the FRAP. Judge Alarcon votes against the imposition of a further sanction. [90-35312] (jlc)

8/11/92 Sent current docket sheet to Warde H. Erwin [90-35312] (jlc)

8/13/92 Filed order (Arthur L. ALARCON, Warren J. FERGUSON, Cynthia H. HALL): the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. [90-35312] (jlc)

8/25/92 Sent current docket sheet to attorney Warde H. Erwin. [90-35312] (jlc)

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs.

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

TRANSMISSION OF RECORD ON APPEAL

APRIL 24, 1990

Warde H. Erwin
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TRANSMISSION OF RECORD

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TO

NINTH CIRCUIT COURT OF APPEALS

Page

INDEX is contained in Document

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

DISTRICT OF OREGON

503 Gus J. Solomon United

States Courthouse

620 SW Main

Portland, Oregon 97205-3090

503) 326-2202 FTS 424-2202

ROBERT M. CHRIST DONALD M. CINNAMOND

Clerk of Court Chief Deputy Clerk

April 24, 1990

=

Clerk of Court

United States Court of Appeals

Ninth Circuit

450 Golden Gate Avenue, 18th Floor

San Francisco, California 94102

Subject: Transmission of the Record

on Appeal

Case Name: FRANZWA V. MULLENNEX

Case No.: CV 88-915RE BKCY CA 90

Enclosed are the following parts of the record on appeal in the instant action:

_1_ Volumes __ thru __ of the case record

_2_ Transcript Volumes _____ - _____

___ Presentence Reprot (PSI)

___ Exhibits

___ Record retained in the District Court

___ Other: ORIGINAL DOCUMENTS #35, 38-41

_____

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cc: Counsel of Record

File

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN B. FRANZWA, INC.,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	CA NO. 90-
V	)	
	)	OREGON USDC
LAVELLE MULLENNEX, ET AL.	)	CV 88-915RE
	)	
DEFENDANTS-APPELLEES.	)	
	)	

RECORD ON APPEAL

FROM THE DISTRICT COURT OF OREGON

RECORDED IN 3 VOLUMES

CLERK'S RECORD IN 1 VOLUMES

REPORTER'S TRANSCRIPT IN __ VOLUMES

THE HONORABLE JAMES A. REDDEN,

TRIAL JUDGE

NAMES AND ADDRESS OF ATTORNEYS OF RECORD

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CA # 90

OREGON D USDC # CV 88-915RE

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN B. FRANZWA, INC., PLAINTIFF-APPELLANT, v LAVELLE MULLENNEX, ET AL., DEFENDANTS-APPELLEES.	CLERK'S CERTIFICATE CA No. 90- OREGON USDC #CV 88-915RE

UNITED STATES OF AMERICA)
) SS:
DISTRICT OF OREGON)

I, ROBERT M. CHRIST, Clerk of the United States District Court for the

District of Oregon, do hereby certify that the documents listed in the foregoing index constitute the record on appeal in which appellant(s) appeals from ORDER of 3/9/90 : that the said record has been prepared by me in accordance with the rules of this court.

I further certify that the cost of filing of the notice of appeal, $5.00 has been paid by the appellant(s).

IN TESTIMONY WHEREOF I have have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 24th day of April . 10 90 .

ROBERT M. CHRIST, CLERK

Tamara J. Ely

BY Tamara J. Ely, Deputy

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor.

SUZAN BREWER,

Plaintiff/Appellee,

vs.

ERWIN & ERWIN, P.C.,

Defendant-Appellant.

APPELLANT'S BRIEF FROM DISTRICT COURT FOR THE STATE OF OREGON

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,)
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Plaintiff/Appellee,)
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vs.)
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ERWIN & ERWIN, P.C.,)
)
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	No. 90-35312 U. S. District Court No. 88-0915-RE
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	APPELLANT'S BRIEF

APPEAL FROM DISTRICT COURT

FOR DISTRICT OF OREGON

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

THE BANKRUPTCY COURT FINDING

The Bankruptcy Judge heard and ruled upon an objection to a claim of a Creditor of Debtor, Marquam Investment. That claim is comprised of substantial legal services performed for the Debtor by its attorneys, Erwin, Lamb & Erwin, P.C., during the period prior to Debtor's Petition in Bankruptcy.

The objection was made by another Creditor of the Debtor. She made a single objection: that the legal services performed were intended to be donated to the Debtor without compensation whatsoever.

The Bankruptcy Judge held the Creditor law firm did not intend to donate these substantial legal services to the Debtor.

DISTRICT COURT REVIEW

The District Judge, without hearing

or argument, considered material not in the record, made new findings, and reversed the Bankruptcy Judge.

The District Judge, as reviewer, held the Creditor did intend to donate these substantial legal services to the Debtor, and denied the claim in its entirety.

This court is asked to examine the District Judge's decision of reversal.

THE ISSUES ON APPEAL

1) May the reviewing judge examine evidence outside the record presented to the Bankruptcy Judge?

The reviewing judge expressly concedes he examined material not presented to the Bankruptcy Judge. He states "the Bankruptcy Judge did not consider later developments."
(See App. Exc. Findings District Court p. 20)

Appellant contends that the

District Court, on review, can only consider the evidence presented to the Bankruptcy Court, and made a part of that record. The District Court may not make its own findings.

Re Ellerle Farms, Inc., 861 F2d 1089, 1090 (8th Cir. 1988).

2) May a reviewing judge draw new inferences from the record when he applies the relevant standard of review?

The reviewing judge in this case, drew new infereces opposing those of the Bankruptcy Judge. He then found the Bankruptcy Judge's finding to be "clearly erroneous."

The term "clearly erroneous" has been defined by the Supreme Court in Anderson v. City of Bessemer City 470 U.S. 564 (1984)

STANDARD OF REVIEW

In cases where the Bankruptcy Judge's findings are reversed by a

District Judge on review, the Court of Appeals is to apply the "clearly erroneous" standard to the decision of the Bankruptcy Judge. That standard is not to be applied to the District Judge's decision of reversal.

Universal Minerals, Inc. v. C. A. Hughes Co. 669 F.2d 98, at 101 (3rd Cir. 1981)

Re Wein Air Alaska, Inc. v. Bachner, 86 F2d 1106, (9th Cir. 1989).

Re Windmill Farms, Inc., 841 F2d 1467 (9th Cir. 1988)

The applicable standard of review is Bankruptcy Rule 8013:

"On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact whether based on oral or documentary evidence shall not be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."

STATEMENT OF JURISDICTION AND TIMELINESS

STATUTORY BASIS FOR JURISDICTION

District Courts review Bankruptcy Court decisions. 28 U.S.C. 158(a)(b).

The Court of Appeals reviews decisions made by District Courts sitting in review of bankruptcy decisions. 28 U.S.C. 158(d).

THE ORDER IS FINAL

The Bankruptcy Court Order

The Bankruptcy Judge divided the hearing of the claim into two parts.

The Bankruptcy Judge decided the claim for fees was not intended to be donated to the Debtor. Accordingly, he held the claim was valid and the claimant was entitled to fees. In a subsequent

hearing, he decided the amount sought was reasonable.

The Reviewing Court Order

The District Court reviewed the Bankruptcy Bankruptcy Judge's decision. The District Court ruled that it would confine review to the Bankruptcy Court's decision, of the validity of the claim of fees, only, not the amount. (App. Exc. D.C. Docket p. 35)

The reviewing court did not review the record of the bankruptcy hearing involving the components of the fees. No record was prepared. No briefing was done on that question. (See App. Exc. D.C. Docket 35-end)

The reviewing judge reversed the Bankruptcy Judge, holding the claimant was not entitled to its claim. The reviewing judge directed the claim be denied in its entirety.

The order is final.

TIMELINESS

The final order of the District Court was entered March 8, 1990. (App. Exc. D.C. Docket p. 35)

The notice of appeal was filed April 5, 1990, within the period of 30 days granted by F.R.A.P. rule (4)(a)(1). (App. Exc. D.C. Docket p. 35, Notice of Appeal p. 1)

STATEMENT OF THE CASE

NATURE OF CASE

Debtor filed a petition in bankruptcy listing the debt, to the Appellant in the amount of $120,000.00 for various legal services.

Brewer filed an objection contending the services were intended to be given to the Debtor for no compensation and that the Appellant never intended to be paid.

COURSE OF PROCEEDINGS

THE BANKRUPTCY COURT HEARING OF THE VALIDITY OF THE CLAIM

An outline of the claim was prepared. (App. Tr. V 1, p. 48)

Judge Hess, after hearings held on April 12, 1985, and May 6, 1985 (App. Exc. Trs. V 1 and V 2), concluded the services were not intended to be gratuitous, and allowed the claim. (App. Exc. Bankruptcy Judge Findings pp. 2 - 9)

The Bankruptcy Judge deferred the question of the reasonableness of the amount claimed to another hearing. (App. Exc. Bankruptcy Judge findings, p. 9)

The question of the reasonable value of these services was heard by the Bankruptcy Court in that later hearing.

THE REASONABLENESS OF THE AMOUNT

For that second hearing, and at the

request of the Bankruptcy Judge and Brewer, a supplemental exhibit outlining the claim was prepared.

That outline contains 65 pages of state court docket sheets, and reviews in detail the time spent in the various categories of work, reconstructed from state court records and from Appellant's files and time records.

In addition, the supplemental exhibit contained outline of amounts, agreed by the parties, to be the correct amount allowable in setoff against the lease under which the claimant rented property owned by the Debtor.

The transcript of the hearing and the supplmental exhibit was not part of the record which was presented to the District Court for review.

That document and the time slips for the services involved were made exhibits

at the second hearing. There was also considerable testimony.

In summary, the supplemental exhibit shows:

1) Total time involved in the services for Marquam: estimated to be 1,475 hours.

Total time after detailed analysis was 1,650.75 hours.

2) Total setoff against the rental obligation owed to Debtor was originally estimated to be $15,658.00.

Total setoffs against the rental owed to Debtor after a detailed analysis of its books was agreed by Brewer and this claimant to be $13,056.73.

3) The appellant has also advanced litigation costs and expenses for the Debtor, of $8,272.91 in cash.

4) That about 42% of the services performed for the debtor, were

performed in matters having nothing to do with litigation involving Brewer.

The reviewing judge considered the supplemental document, even though the transcript of testimony and numerous other documents which supported it were not part of the record.

The review of this document, which was not part of the record, caused the district judge to draw conclusions which were mistaken, both in fact and in the new inferences which he came to draw in his findings.

THE DISTRICT JUDGE'S REVIEW

The District Judge reviewed the trial judge's finding as to the validity of this claim.

The District Judge expressly ruled that the record with respect to the reasonableness of the fees involved,

would be submitted to him after he reviewed the question of whether the legal services were intended by the Claimant to be given without compensation. (App. Exc. Docket p. 35)

We list below those items which the reviewing judge considered, over our specific written objection in brief, at footnote 1.

1 Erwin & Erwin objected to the reviewing judge considering material not before the Bankruptcy Judge. Those materials objected to in the reviewing judge's court, are as follows.

Brewer designated a number of documents in her excerpt, before the reviewing judge, which were not received or con-sidered at trial. She argued certain propositions from those documents in spite of the fact they were considered for a particular limited purpose, or were not part of the record below.

Brewer's excerpt p. 54 - 71:

evidence was admitted by stipulation. See App. Exc. Transcript V 1, pp. 174 - 177.

Brewer's excerpt p. 75 - 87:

This document was not considered by the Bankruptcy Judge. However, Judge Marsh has specifically reserved the question of how much was actually paid, and what the reasonable value of the tenancy was during the relevant period.

Judge Marsh has, by remand order, asked the bankruptcy judge to establish the value of the tenancy and to calculate the actual rental paid toward that obligation.

Brewer's excerpt p. 11-12:

This document was not considered by the Bankruptcy Judge. This document was prepared after the conclusion of the record as to the validity of the claim, at the express request of the trial judge and Brewer's counsel, both of whom

requested a detailed analysis from time records, and records of the state court. The claimant undertook several hours' time to comply with these requests.

In spite of this objection, the District Judge commenced to consider these "excerpts" served up by Brewer at District Court review, in spite of his knowledge they were not in the record of the bankruptcy hearing.

THE BANKRUPTCY TRIAL COURT PROCEEDINGS
Brewer called witnesses.

Brewer offered exhibits, and the parties stipulated to two additional pieces of evidence.

The stipulated testimony of Judge Abraham was received. (App. Exc. Transcript V 1, p. 174 - 177)

The Planning Commission's written approval of debtor's realty development also was received by stipulation. (App. Exc. Transcript V 2, p. 174)

Erwin & Erwin, P.C. introduced exhibits. Charles Erwin, a member of the Appellant's law firm, testified (App. Exc. Transcript V 2, pp. 97 - 172), as did LaVelle Mullennex, an officer of Debtor (App. Exc. Transcript V 2 pp. 49 - 97).

Argument appears at App. Exc. Transcript V 2, p. 179 - 194.

The court's findings appear at App. Exc. p. 2 and App. Exc. Transcript V 2, p. 194.

STATEMENT OF FACTS

The Debtor was always aware of the work being provided by its attorneys and the extent of that work. Ms. Mullennex, herself, a shareholder of debtor, typed many of the creditor's motions and other litigation documents, and was completely familiar with the scope and nature of the legal services provided to the Debtor. (App. Exc. Transcript V 2, p. 50 - 52).

This is because in addition to being a shareholder of Marquam, she was also an employee of Erwin, Lamb & Erwin, P.C.

Ms. Mullennex prepared time slips, and was familiar with their content. Erwin, Lamb & Erwin, P.C. also advanced litigation expenses.

Ms. Mullennex produced at trial (App. Exc. Transcript V 2, p.57), time slips representing hundreds of hours of service rendered to Marquam by this creditor.

These slips were made daily at the time the work was performed. (App. Exc. Transcript V 2, p. 61).

There was never any intention to make a gift of the services rendered to Marquam. (App. Exc. Transcript V 2, p. 80)

The Debtor always understood that it would be responsible for these legal fees.

She kept the financial books of Marquam on a cash basis. (App. Exc. Transcript V 2, p. 63)

The Bankruptcy Court heard testimony from two C.P.A. witnesses. Both were asked whether or not it would be proper to record any amounts owing to creditors as a result of non-cash transactions in the debtor's books.

The answer by both C.P.A.'s is that it would be improper to record payable amounts in the books and records of the debtor, using the accounting method which debtor had historically used. (Mr. Solomon, C.P.A. App. Exc. Transcript V 1, p. 195 - 197, p. 207 - 213, Mr. Roy Griffin, C.P.A., p. 215 - 220).

The witnesses called on these points did not supported Brewer's contention that liabilities are <u>required</u> to be listed where books are kept on a cash basis, or that billings are required to

be sent under the circumstances here. Mr. Charles Erwin insisted that payment of prior legal fees by Marquam be made to his law firm. (App. Exc. Transcript V 2, p. 104) (The bargain he had for payment of fees appears at p. 104.)

The work Charles Erwin did during that period, proved eventually to be so extensive, that it was almost to the exclusion of other work.

App. Exc. Transcript V 2, p. 98, (and exhibits) describe some of the time involved in some litigation with Brewer and comprise more than $40,000.00 in fees. (App. Exc. Transcript V 2, p. 98 - 101)

Charles Erwin could not afford to make any gifts. His gross income for the periods were: $15,000.00 for 1978, $19,995,00 for 1979, $20,250.00 for 1980, $13,000.00 for 1981, and $31,000.00 for 1982. He had to borrow $21,000.00 in

1981 just to pay bills. (App. Exc. Transcript V 2 p. 105)

Payment by Marquam to Erwin, Lamb & Erwin, P.C. was discussed. (App. Exc. Transcript V 2 p. 79)

Brewer argued that nothing was done to pursue realty development after September 1980. She urged that there were no plans to pay the Debtor's attorneys.

There was evidence presented to the contrary. (App. Exc. Transcript V 2 p. 141 - 144.) In fact, Marquam had received development financing, sought and received development approvals.

During the period, Marquam reduced debt by payment of all mortgages on realty committed to development. (App. Exc. Transcript V 2, p. 65), and purchased additional land (App. Exc. Transcript V 2, p. 67 - 68)

The Debtor, architects, and Mr.

Warde Erwin were engaged in financing and planning approvals for the development. (App. Exc. Transcript V 2, p. 84 showing loan approvals in 1982)

The values of the property of Marquam were listed in the schedules at approximately assessed value; attorney fees and other debts would have been paid from funds received by the debtor for its land. (App. Exc. Transcript V 2, p. 83)

The documents regarding the condominium development provided for payment to Marquam for its land in the amount of $150,000.00 (App. Exc. Transcript V 2, p. 102). Financing was arranged. (App. Exc. Transcript V 2, p. 102 - 103). If material prices rose, Marquam would receive not less than $127,500.00 for land.

Marquam was to have retained all improved property and would receive $127,500.00 to $150,000.00 for the realty committed to the realty development in

addition to retaining the improved realty. (App. Exc. V 2, p. 168)

The work for realty development legal work came from the project revenue, after Marquam had received payment for its land. But all other attorney fees (not for realty development) must be paid by Marquam. (App. Exc. Transcript V 2, p. 104).

The parties stipulated no further City approvals were necessary to go forward with construction. (App. Exc. Transcript V 2, p. 173 - 174) The project was virtually ready for market.

The revenue from the sale of Marquam's land was one obvious source of payment. Marquam's improved property was another additional source.

Charles C. Erwin described the circumstances surrounding the services rendered and the history of the cases in which the attorney were involved.

While the law firm is the claimant, most services were done by Charles C. Erwin. (App. Exc. Transcript V 2, p. 118)

In a 1980 state court case, Marquam was asked to stipulate to the value of its realty in lieu of expert testi-mony. Marquam did so stipulate. There was no evidence or stipulation regarding its net worth or debt, whatsoever.

Brewer's counsel did not inquire, although they were aware of these obliga-tions. (App. Exc. V 2, p. 153)

In May 1982, Brewer brought suit in State court to set aside the transfer of easements and land committed to the project.

State Court Judge Philip Abraham's evidence came by stipulation. The stipu-lation is found at App. Exc. Transcript V 1, pp. 174 - 182.

In this 1982 case, the subject was

whether or not the transfer of part of Marquam's realty, for future payment, would hinder or delay Brewer. Marquam retained improved and realty and land of a value equivilant to pay its creditors, in addition to the land which it committed to the development project. No stipulation was sought nor received, nor did Brewer inquire on the subject of creditors other than herself. (App. Exc. Transcript V 2, pp. 153 - 153)

The state court judge found the evidence prepon-derated to establish a possible delay or hindrance.

As a direct result of this suit by Brewer, the debtor's financing commitments were revoked, and the purchasers' deposits had to be returned. The debtor became unable to generate funds to pay its debts and bankruptcy followed.

ARGUMENT

THE DISTRICT JUDGE ERRED WHEN HE

CONSIDERED MATTERS WHICH WERE NOT IN THE RECORD.

The reviewing judge made new findings, based upon documents and events not in the record.

1. The reviewing judge found, among other things, that Erwin, Lamb and Erwin, P. C. did not "adequately support its claim".

The reviewing judge cites no requirements for "adequate support" beyond what was given in evidence at the lower court.

The issue reviewed by the District Judge was whether or not the claimant intended to donate legal services to its client, the Debtor. No issue was presented claiming that the elements supporting this claim were "inadequate."

The District Judge did have properly before him over 300 hundred pages of transcript which demonstrated not only

that the claimant intended to be compensated, but which record discussed the method by which that compensation would have been achieved. The proceeds due the debtor from land committed to the realty development was a source of funds to pay claims of creditors.

The District Judge considered the booklet describing the basis for the claim of the attorneys. (See p. 6 above) (While this document was never part of the record of the case the reviewing judge did consider it.) That document contained 65 pages of detailed description of the work done for the Client Debtor and contained a summary of time slips.

However, in view of the fact the reviewing judge considered over 65 pages of documentation outside the record, it is difficult to identify what more support

could be expected, even if the issue were properly before the reviewing judge.

2. The reviewing judge found the rental setoff, originally estimated at some $15,658, to have "disappeared and re-appeared as a different setoff." (App. Exc. D.C. Opinion pp. 23 - 24) He made a finding that amount was "13,056.73 for utility bills Erwin, Lamb & Erwin paid."

The basis for this finding is found nowhere in the record submitted to the Bankruptcy Judge. That statement is also nowhere in the booklet (which is not part of the record, but which the reviewing judge examined neverthless).

The source of this finding is a complete mystery. Review of the trial which involved this part of the claim was not one committed to the reviewing judge, because the components of the amount of this claim, and setoffs were not part of the record before the reviewing judge.

If the reviewing judge had considered the record of the hearing on amount, he would have known the parties had agreed the amount of the setoff allowable to be a maximum of $13,056.73. The reviewing judge chose instead to assume without any support from the record, that these amounts were "utility bills paid" by this claimant.

In the absence of transcript, and in the absence of hearing which would have allowed the reviewing judge to ask about the subject, he reached an erroneous conclusion.

3. The District Judge concluded Erwin, Lamb "dropped its claim for legal work on the Realty development project." (App. Exc. Findings District Court, p. 24)

This finding evidently comes from sources outside the record reviewed by the District Judge.

The record shows that this

"claim for legal fees for realty work" was to be paid from the Realty development revenue, not from the Debtor. (See App. Exc. Transcript V 2, p. 104).

The Bankruptcy Judge also found so. (App. Exc. Findings Bankruptcy Judge p. 4-5)

As a result of sales of the project, the Debtor would have received revenue from its land to pay its creditors. The Debtor was not itself to pay development legal fees from its land committed to the project.

Discussion of the work involved in bringing the development to market were introduced to to meet the Brewer's claim that Debtor had no ability to pay "such large fees" and that the Debtor was doing nothing to generate the funding to pay claims.

They illustrate the efforts of Debtor to generate money to pay claims.

They were not presented as support for the claim itself, rather they show the Debtor's efforts to generate funds were substantial and ongoing.

The reviewing judge was not justified in drawing conclusions from the summary of work done, which was not part of the record before him. That document was prepared long after the record which was committed to the District judge for review had closed, and was not accompanied by the record and trial exhibits which are necessary to full understanding of the document.

But the conclusions which he reached are not supported even by consideration of the booklet itself.

4. The District Judge took into account a ruling of another District Judge in another matter. (App. Exc. Opinion District Judge, pp. 18, 19)

That ruling likewise was not part of

the record before the Bankruptcy Judge nor the record before the reviewing judge. (App. Exc. District Judge Opinion p. 18, citing Judge Marsh, June 13, 1986). This record on review closed in 1985.

There was no opportunity for the Appellant to brief or argue the propriety of consideration of documents, not in the record or opinions of other judges, similarly not in the record. The reviewing District Judge neither allowed argument nor gave notice of his intent to rule without hearing as Rule 8012 Bankruptcy Rules requires.

5. The reviewing judge quotes from State Court Judge Philip Abraham. Those quotes are found at App. Exc. District Court Findings pp. 17, 18 and 30.

The actual content of the state judge's submittal is found at App. Exc. Transcript V 1, pp. 174 - 182, in the

proceedings before the Bankruptcy Judge.

The passages quoted by the reviewing judge cannot be located anywhere in the record presented to the Bankruptcy Judge

6. The District Judge found Marquam brought an action against Aetna Insurance claiming it had incurred "$120,000.00 in legal fees during its tort litigation with Brewer," and (then) "sought only $25,600.00 for the same services in Bankruptcy Court." (App. Exc. Findings District Court p. 27)

There is no support for this finding in the record. These findings by the reviewing judge are the product of something other than the Bankruptcy Court evidence.

Marquam did bring state court claims against its insurer asking for defense costs reimbursement under the policy of insurance.

There was no hearing in which the

elements comprising the claim against Aetna was heard. Had the reviewing judge examined the attorneys for Marquam and Aetna in that case, he would have found the prayer of Marquam was for defense costs in a wide range of claims made by Marquam's tenants.

Those defense costs were for (not less) than the following matters.

Marquam v. Meyers	Defense of counterclaims in F.E.D.
	Writ of review and appeal thereof
	Defense of counterclaims in F.E.D. on remand
Marquam v. Brewer	Defense of counterclaims in F.E.D.
Brewer v. Beers	Writ of Mandamus arising from F.E.D.

Marquam v. Brewer	Trial of F.E.D. and counterclaims
Marquam v. Peck	Defense of counterclaims
Brewer v. Marquam	Defense of tort claims

The prayer against its insurer was most certainly not exclusively for reimbursement of "Brewer tort claim defense costs."

The record is barren of any claim by this Appellant for "only $25,600.00" for the services in defense of the several claims brought against the Debtor by its tenants. Such an amount would be unreasonably low, in view of the scope of work necessary to defend the claims involved in the onslought of protracted litigation with the tenants of the Debtor in State Court.

The source of these findings is unknown.

The finding of the reviewing judge on this point appears to have no basis even outside the matters which the reviewing judge did consider.

The consideration and reliance placed upon material outside the record was error.

APPLICABLE LAW

Additional findings to those of the Bankruptcy Court are not to be made by the reviewing court.

A reviewing court may not substitute its own findings for those of the primary tribunal merely because it finds other inferences more likely.

Universal Minerals, at 104.

A reviewing court may not consider the evidence de novo and must be particularly reluctant to disregard a finding based on evaluation of testimony drawing

credibility into question. Re Multiponics, 622 F.2d 709 (5th Cir. 1980) Anderson, 470 U.S. at p. 575.

The findings on questions of intent are questions of fact, or in some instances, mixed questions of law and of fact, and the findings will not be set aside on anything less than a demonstration of clear mistake in applying the law.

Tepper v. Chichester, 285 F.2d 309 (9th Cir. 1960)

Questions of intent are factual and committed to the trial court. The reviewing court is not at liberty to arrive at different conclusions by emphasizing different inferences which might be drawn. Universal Minerals, at p. 104

Questions of intent are to be drawn from the testimony and conduct of the witness. The Eighth Circuit has observed In Re Neis:

"The issue of Don Neis' intent to abandon or create a particular homestead is a question of fact, or of inference to be drawn from facts, for the bankruptcy court to determine. Once such a determination is made, the district court in review may only accept such findings or reject them as 'clearly erroneous;' the district court may not accept the findings of the bankruptcy court and then go on to make additional findings having the effect of contradicting the conclusions of the bankruptcy court.

. . . . .

"Further, a determination of intent is necessarily based both on inferences to be drawn from the conduct of the individual whose intent is in question and on his testimony. The bankruptcy judge had the opportunity

to observe Neis throughout the proceedings and on the witness stand and to evaluate his credibility. It is precisely because of this unique opportunity that the ability of the reviewing court to disturb findings of fact is limited."

Re Neis, 723 F.2d 584, 589 (7th Cir 1983)

THE BANKRUPTCY JUDGE'S FINDING THAT THE CLAIMANT INTENDED TO BE COMPENSATED FOR VALUABLE LEGAL SERVICES WAS NOT CLEARLY ERRONEOUS.

In cases where the Bankruptcy Judge's findings are reversed by a District Court on review, the Court of Appeals is to apply the "clearly erroneous" standard to the finding of the Bankruptcy Judge.

"... As an appellate court twice removed from the primary tribunal, we

review both the factual and the legal determinations of the district court for error. The district court does not sit as a finder of facts in evaluating them as a court of review, and therefore its evaluation of the evidence is not shielded by the 'clearly erroneous' standard of Fed. R. Civ. P. 52(a), which applies only to a trial court sitting as a fact finder. We are in as good a position as the district court to review the findings of the bankruptcy court, so we review the bankruptcy court's findings by the standards the district court should employ, to determine whether the district court erred in its review. . . ."

Universal Minerals,, at pp. 101 - 102.

Re Wein Air Alaska, Inc. v. Bachner, 860 F2d 1106, (9th Cir. 1989)

Re Windmill Farms, Inc., 841 F2d 1467 (9th Cir 1988)

The Supreme Court has discussed the meaning of "clearly erroneous".

> "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that '[a] finding is erroneous'" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.W. 100, 123 (1969). If the district court's account of the

evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.W. 844 (1982).

"This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. To be sure, various Courts of Appeals have on occasion asserted the theory that an

appellate court may exercise de novo review over findings not based on credibility determinations. See, e.g., Orvis v. Higgins, 180 F.2d 587 (CA6 1981); Swanson v. Baker Industries, Inc., 615 F.2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand. See Orvis v. Higgins, supra, but it is impossible to trace the theory's lineage back to the text of Rule 52(a) which states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous.' That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52(a) 'does not make exceptions or purport

to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.' Pullman-Standard v. Swint, 456 U.S., at 287.

"The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accurancy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already

been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be 'the main event' . . . rather than a 'tryout on the road.' Wainwright v. Sykes, 433 U.S. 72, 90 (1977). For these reasons review of factual findings under the clearly erroneous standard with its deference to the trier of fact -- is the rule, not the exception.

"When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only

the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. 412 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story, or the story itself may be so internally inconsistent or implausible on its fact that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based

on a credibility determination. See, e.g., United States v. United States Gypsum Co. supra at 396. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 433 (CA2 1945); Orvis v. Higgins, supra, at 539-540."

Anderson v. City of Bessemer City, 470 US at 573-576

The Reviewing judge incorrectly drew new inferences opposing those of the Bankruptcy Judge.

1. Time slips for the work involved in the claim were kept regularly. (App. Exc. Transcript V 2 p. 56-57)

The Bankruptcy Judge found this significant. (App. Exc. Findings Bankruptcy Judge p.7)

The District Judge accepted that they were so kept. (App. Exc. Findings District Court p. 26). He then holds the "(claim in Bankruptcy) does not reflect such records" (Findings p.26) and the "claimants claim should be rejected as without documentation" (Findings p.29)

This inference is not justified. The fact is that the timeslips were both kept and produced in the Bankruptcy Court trial. (They also are exhibits in the hearing on amount, which was not reviewed by the District Court.)

2. The record in Bankruptcy Court showed a method by which the debtor could have paid this claim.

The reviewing judge drew a new inference. He calculated that "if (the debtor) were paid for its land, it would receive at most only $30,000 more than the" fees owed to attorneys. The attorneys "would have rendered its client insolvent." (App. Exc. Findings District Court p. 30)

This new finding is unsupported even by inference.

The evidence is uncontradicted that the Debtor retained an office building apart from land committed to the residential project. (App. Exc. Transcript V 2 p.168)

3. The reviewing judge drew new inferences from the fact bills were not sent to the Debtor.

The Bankruptcy Judge found such billings would have been to no good purpose, without the Debtor having present

funds to pay. (App. Exc. Bankruptcy Court Findings p. 6)

While the reviewing judge concedes the reason is that such billings would be pointless since the client had no present funds, then he finds "(this failure) shows an incestuous relationship." (App. Exc. Findings District Court p. 26)

The evidence shows the debtor did not have the present funds to pay this claim. The debtor was at all times completely aware of the scope and extent of the services being provided in all categories of the work claimed. One of the Debtor's stockholders kept regular time records of the elements which made up the claim. (See Facts above pp. 10 - 11).

4. The reviewing judge drew new inferences from state court proceedings, "Marquam did not disclose the claim for legal fees in state court proceedings." (App. Exc. District Court, p. 17)

The reviewing judge found evidence that Brewer (the opponent) did know of the existence of such claims, at least in cases where fees were sought against Marquam's tenants in state court litigation. (App. Exc. Findings, District Court, p. 28)

Brewer did not inquire in state court about fees owed by Debtor, inspite of this knowledge.

The evidence showed the circumstances. (See App. Exc. Transcript V 1, p. 153)

The trial judge observed there was no duty to disclose these amounts under the circumstances presented within the state court litigation. (App. Exc. Transcript V 2, p. 154)

The reviewing judge disposes of Brewer's early knowledge and the Bankruptcy Judge's observation by saying, "The explanation does not seem

'adequate'" and "Brewer is not responsible for raising such evidence." (App. Exc. Finding, District Court, p. 28)

The reviewing judge drew a different inference from the evidence in the record.

He did not speak to the evidence offered describing the circumstances of those state court proceedings, other than to weigh the adequacy of this evidence. He finds no basis to reject the finding of the trial judge.

The reviewing judge drew opposing inferences from those made by the Bankruptcy Judge. This was error.

APPLICABLE LAW

New inferences opposing those of the Bankruptcy judge are not permitted to be made by a reviewing court.

".... The district court chose, however, to emphasize other facts not

mentioned in the bankruptcy court's opinion and to draw opposing inferences from the record. In doing so, the district court erred. A reviewing court may not substitute its own findings for those of the primary tribunal merely because it finds other inferences more likely."

Universal Minerals, at p. 104

"The reviewing court oversteps the bounds of its duty under Rule 52(a) when it undertakes to duplicate the role of the lower court."

Anderson, 470 U. S. at p. 564.

The Appellant contends the reviewing judge failed take account of the requirements of Anderson.

He failed to keep in mind that his function is not to decide factual issues de novo.

He failed to take account that the Bankruptcy Judge accepted a plausible

version based upon the record presented to him in its entirety, and that even if the reviewing Judge would have decided differently, had he tried the case, he may not do so in his role as reviewing judge.

The reviewing judge did not keep in mind that the case rested in some significant part upon the credibility of the witnesses presented at the Bankruptcy hearing. The Bankruptcy Judge observed their demeanor and heard them.

> "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and

belief in what is said. See Wainwright v. Witt, 469 U.S. 412 (1985)."

Anderson, at 575.

He decided to accept one version of the facts over another.

". . . Where there are two per-permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)"

Anderson, 470 U.S. at p. 574

The Bankruptcy Judge's finding and the reviewing court's new and different findings might present two choices, but under the law, the Bankruptcy Judge's choice is not clearly erroneous.

When tested by the rules of analysis announced by the Supreme Court, the Bankruptcy Judge should be affirmed. More directly put, by Justice Powell in Anderson, where factual versions could be decided for either party, based upon the record of the case, the lower court's decision cannot be clearly erroneous.

Anderson, 470 U.S. at p. 581

CONCLUSION

The District Judge reversed the Bankruptcy Judge's findings, and went forward to make his own findings. Several new findings were derived from matters not in the record on review.

The reviewing judge's analysis and the new findings he made are flawed by his extra record excursion.

Other findings were derived from reviewing the record and then drawing inferences different from those of the Bankruptcy Judge.

New inferences are not to be drawn by reviewing courts.

The District Judge found the appellant's claim as a Creditor in the Bankruptcy to be a "skirmish in a war." (App. Exc. Findings, District Court p. 11) He remarked, the presentation by both sides to the Bankruptcy Court was "unhelpful" and that the case had become a "feud" between the parties and their counsel. (App. Exc. Findings District Court p. 21) He observed that since the claim was allowed, punitive damages collection would be "obliterated." (App. Exc. Findings District Court p. 12)

These quotations from the reviewing judge's opinion demonstrate the personal view held by the author of reviewing judge's opinion.

Perhaps these remarks explain why the reviewing judge felt a result, different from that which the Bankruptcy

Judge reached, would be better. But these personal views do not justify departure from the rule of law applicable to cases on review from Bankruptcy Courts.

New findings are not permitted to be made by a reviewing judge, particularly when based upon matter outside the record.

New inferences drawn from the record are not permitted to be made. The scope of review is not de novo.

The only question in this case is the state of mind of the attorneys with regard to their compensation.

There was substantial evidence to support the Bankruptcy Judge. It is he who had the only opportunity to review the demeanor of the witnesses. It is he to whom creditibility assessments are committed exclusively.

The Bankruptcy Judge viewed the

evidence as a whole, both pro and con, and answered the question whether or not these legal services were gratuitous.

The reviewing judge did not do so. His opinion selected only certain items for consideration, He considered other factors not in the record, and apparently considered items off record entirely.

While the evidence and witnesses in the actual record of this case, may allow two fact finders to reach two different findings, the evidence taken as a whole would support each fact finder's views. The reviewing judge is not empowered to adopt his own inferences different from those of the Bankruptcy Judge.

As the Supreme Court of the United States has remarked:

> ". . . the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial

judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . ."

Anderson, 470 U.S. at p. 575.

If the applicable record on review is viewed as a whole, the Bankruptcy Judge's ruling that fees were not intended to be donated to the Debtor is supported by the evidence. This is so, particularly in view of his opportunity to hear and see the witnesses, and also to weigh their credibility.

The Supreme Court has observed, in such cases, it is the trial judge's resolution of two conflicting versions which is controlling. That ruling will not be disturbed by a reviewing judge.

RELIEF SOUGHT

The appellant requests this court

reverse the reviewing court. Specifically, the Bankruptcy Judge's holding that these extensive legal services were not donated, was not clearly erroneous.

This court is requested to hold the Bankrukptcy Judge's finding affirmed.

STATEMENT OF RELATED CASES

There are no related cases.

Respectfully submitted,

CHARLES C. ERWIN
Attorney for Appellant

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs.

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

CONSTITUTIONAL PROVISIONS,

STATUTES, AND RULES VERBATIM

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

OREGON REVISED STATUTES
(Professional Corporations)

"58.075 **Purposes for which professional corporation may be organized.** (1) A professional corporation may be organized to render one type professional service only and services ancillary thereto through its shareholders, directors, officers, employees, and agents

who are themselves duly licensed to render such service. Shareholders holding a majority of the shares and a majority of the directors of the corporation must be licensed to render the professional service in which the corporation is organized.

POWERS AND DUTIES

"58.155 **Method by which professional corporation to render services.** A professional corporation may render professional service only through individuals who are licensed within this state to render the professional service for which the corporation is organized and who are its shareholders, directors, officers, employees or agents. (1969 c. 592 §10)"

FEDERAL RULES OF APPELLATE PROCEDURE

FRAP 38. **DAMAGES FOR DELAY**

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

BANKRUPTCY RULES - APPEALS

"**Rule 8013. Disposal of Appeal; Weight According Bankruptcy Judge's Findings of Fact.**

"On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a

bankruptcy court's judgment, order,or decree or remand with instructions for further proceedings. **Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."** (Emphasis supplied)

FEDERAL STATUTE

11 U.S.C., 502 provides:

"(a) A claim or interest, proof of which is filed under Section 501 of this Title (11 USC §501) is deemed allowed unless the party in interest . . . objects."

"(b) . . . if such an objection is made, the court after notice and hearing shall determine the amount of such claim as date of the petition and shall allow such claim in lawful currency of the United States in such amount except to the extent that . . ."

* * *

"(4) . . . if such claim is for 'services' of an 'insider' or 'attorney of the debtor,' such claim exceeds the reasonable value of services."

FRAP 35. DETERMINATION OF CAUSES BY THE COURT IN BANC

(a) When Hearing or Rehearing In Banc Will be Ordered. A majority of

the the circuit judges who are in Regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

CIRCUIT COURT ADVISORY COMMITTEE NOTES TO RULES 35-1 to 35-3

"(4) **Suggestions for Rehearing En Banc.** When the clerk receives a timely petition for rehearing which also suggests a rehearing en banc, copies are sent to all active judges. If the panel grants a rehearing, it so advises the other members of

the Court, and the suggestion for rehearing en banc is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing Cases are rarely reheard en banc.

"If no suggestion for rehearing en banc has been submitted and the panel votes to deny rehearing, an order to that effect will be prepared and filed. If a suggestion for rehearing en banc has been made, the panel will first make known to the other members of the Court its decision to deny rehearing and its recommendation with regard to the en banc suggestion. Upon receiving such notice, any judge in active service may request en banc consideration whereupon on a vote will be taken. If no judge requests or gives notice of an intention to request en banc consideration within 21 days of the panel's recommendation, the panel will enter an order denying rehearing and rejecting the suggestion for rehearing en banc.

"Any judge who is not recused or disqualified and who entered upon active service before the call for a vote is eligible to vote. A judge who takes senior status after a call for a vote may not participate in the en banc rehearing or be eligible to vote on subsequent questions relating to the case. This rule is subject to two exceptions (1) a judge who takes senior status during the pendency of an en banc case for which the judge

has already been chosen as a member of the panel may continue to serve on that panel until the case is finally disposed of; and (2) a senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a member of the en banc court when it reviews a decision of a panel of which the judge was a member.

"The En Banc Coordinator notifies the judges when voting is sufficiently complete to determine the result. If the recommendation or request fails of a majority, the En Banc Coordinator notifes the judges and the panel resumes . . . ."

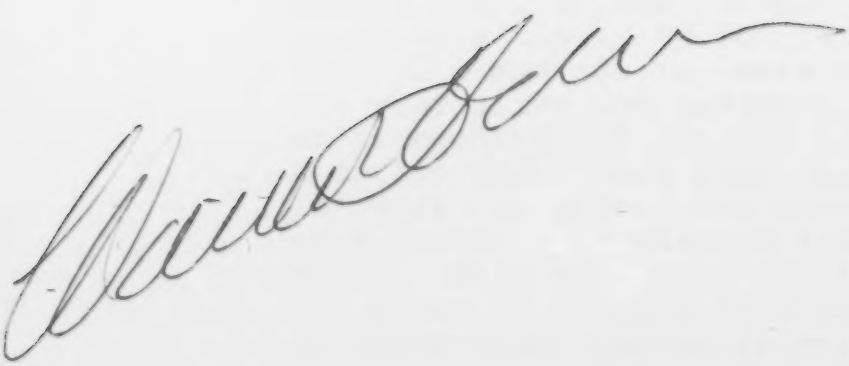
FEDERAL RULES OF CIVIL PROCEDURE

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) **Clerical Mistakes.** Clerical mistakes in judgments,orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes, Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** Upon motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsice or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. 1655, or to set aside

a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."



FILED
NOV 9 1992
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No. 92-668

In The

Supreme Court of the United States

October Term, 1992

ERWIN & ERWIN, Professional Corporation,

Petitioner,

vs.

SUZAN BREWER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Ninth Circuit abuse its discretion in imposing a sanction against Erwin & Erwin pursuant to Rule 38 of the Federal Rules of Appellate Procedure for filing a frivolous appeal from the United States District Court's Order of March 8, 1990.

(2) Does this Court have jurisdiction to review the Ninth Circuit opinion in *Brewer v. Erwin & Erwin, P.C.*, 942 F.2d 1462 (9th Cir. 1991).

(3) Was the Ninth Circuit legally correct in holding that the Bankruptcy Court's Order which allowed Erwin & Erwin as insiders of Marquam Investment Corporation an attorney's fee of $120,000 was legally incorrect.

STATEMENT OF THE CASE

Nature of the Claim and Proceedings Below

The appeal to the Ninth Circuit involved an attempt by Erwin & Erwin, P. C. to reinstate a claim of $120,000 for attorney's fees for pre-bankruptcy petition services it claims it intended to charge to Marquam Investment Corporation. The Bankruptcy Court allowed the claim in full. Erwin & Erwin's statement of the case incorrectly states Brewer did not appeal the reasonable value of its services. Pet. for Cert., p. 18. This is wrong. She challenged the entire claim. Lod., pp. 2-4. Brewer appealed to the United States District Court for the District of Oregon, which reversed the Bankruptcy Court and dismissed Erwin & Erwin's claim. Resp. A.1. Erwin & Erwin appealed to the Ninth Circuit, which affirmed the District Court. *Brewer v. Erwin & Erwin, P.C.*, 942 F.2d 1462 (9th Cir. 1991). Following the Ninth Circuit decision, Brewer filed a claim for attorney's fees of $5,058.75 against Erwin & Erwin pursuant to Rule 38 of the Federal Rules of Appellate Procedure, which the Ninth Circuit allowed. *Brewer v. Erwin & Erwin, P. C.*, 959 F.2d 800 (9th Cir. 1992). Erwin & Erwin filed a petition for certiorari on October 13, 1992.

STATEMENT OF RELEVANT FACTS

This case has been ongoing between Brewer and Erwin since April, 1976. Brewer was at one time a tenant in a house which Marquam Investment owned in Portland, Oregon, Warde Erwin and his legal secretary. Lavelle Mullennex own all of the stock of Marquam Investment Corporation. Tr. 52-53 (5-6-85). A dispute

developed between Brewer and Erwin, and she filed claims for damages for intentional infliction of emotional distress and for violations of Oregon's Residential Landlord and Tenant Act, ORS 90.100 et seq. After two trials and two appeals, the Oregon Court of Appeals reinstated a jury verdict in favor of Brewer for $97,880. $75,000 of this verdict was for punitive damages against Marquam only. *Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398 (1979), 61 Or.App. 642, 658 P.2d 1180 (1983), *rev. den.*, 294 Or. 792, 662 P.2d 728.

Shortly after the Oregon Supreme Court denied review of Marquam's appeal, it filed bankruptcy. Marquam claimed its assets, which consisted almost solely of real property, were worth only about $107,000, and Erwin & Erwin filed a general claim for services for attorney's fees of $120,000. Lod., pp. 5-7. Most, if not all of this, involved defending the Brewer claim and representing Marquam in various related cases. Lod., pp. 8-9. This claim did change over time. Lod., pp. 10-11.

Brewer objected to this claim contending that Erwin & Erwin fabricated it for purposes of the bankruptcy to prevent her from collecting her punitive damage award. There were no written documents of any type to support this claim. There were no bills, no corporate minutes discussing how to pay for these services, no accounts payable and no payments. Tr. 86-87 (4-2-85). Furthermore, the only way Marquam could pay for these services was to liquidate its assets. Lavelle Mullennex testified that her investment in Marquam was her retirement, thus limiting the option of liquidation to pay Erwin & Erwin's fees. Tr. 52-53, 80-81 (5-6-85).

Erwin & Erwin, P. C. consists of two lawyers, Warde H. Erwin and his son, Charles Erwin. Together with Lavelle Mullennex, they constituted the entire board of directors of Marquam Investment Corporation in May, 1983. Lod., p. 1.

SUMMARY OF ARGUMENT

The Court of Appeals acted within its discretion in finding that Erwin & Erwin's appeal was frivolous. Erwin & Erwin's claim for fees had no reasonable basis in the Bankruptcy Court, much less in the Ninth Circuit. It was a classic insider's claim which the Bankruptcy Court should have vigorously scrutinized. The evidence was overwhelming that the claim was a fabrication by Erwin & Erwin to try to thwart Brewer from collecting her judgment. The Bankruptcy Court had no basis to allow this, and the United States District Court was correct in dismissing it. Erwin & Erwin had no reasonable basis to appeal this case to the Ninth Circuit, and that Court acted within its discretion in imposing a sanction on Erwin & Erwin.

ARGUMENT

The imposition of sanctions was within the Ninth Circuit's discretionary powers. The Ninth Circuit decided two underlying issues which disposed of this case on the merits. It held first that the Erwin & Erwin claim was an insider claim for services, and this Court requires rigorous scrutiny of it pursuant to *Pepper v. Litton*, 308 U.S.

295, 306 (1939). The Bankruptcy Court did not do this, it held that the Erwin & Erwin claim was not an insider claim, and it did not place the burden of proof to justify this claim on Erwin & Erwin. A.1. The Ninth Circuit correctly decided that this decision had no basis in fact or law. *Brewer v. Erwin & Erwin*, 942 F.2d 1462 (9th Cir. 1991).

Secondly, the Ninth Circuit agreed with the District Court that the evidence against this claim, namely, the lack of any records to support it, made it so implausible on its face that no reasonable factfinder could credit it. It held that the Bankruptcy Court's finding that Charles Erwin did not intend to donate his services was clearly erroneous. *Brewer v. Erwin & Erwin, supra*. This opinion is overwhelmingly correct, and there is no reason for this Court to review it.

The Ninth Circuit imposed sanctions because the claim of Erwin and Erwin was so absurd and implausible that it should not have appealed its denial to that court. Both the law and the facts should have convinced Erwin & Erwin long ago not to have pursued this claim. The fact that the Bankruptcy Court initially allowed the claim did not give it a reasonable basis in fact or law. Once the District Court correctly exposed the extreme invalidity of Erwin & Erwin's claim, they should not have wasted further time pursuing it to the Ninth Circuit.

This case does not present any unique issues for this Court. The Ninth Circuit realized this case deviated so far from an accepted legal and factual basis that it justified sanctions for a frivolous appeal. This does not mean that

most appeals to reinstate a bankruptcy court's decision may be in this category. This case was unusual because the Erwin claim had no basis whatsoever and the Bankruptcy Court ignored established law and the facts in its decision.

This Court should leave the imposition of sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure to the Circuit Courts' discretion to decide on a case-by-case basis as the Ninth Circuit did in this case. It should not impose any inflexible rules to control their discretion.

Erwin & Erwin ask this Court to vacate the Ninth Circuit opinion which affirmed the District Court's denial of their attorney's fee claim. This Court does not have jurisdiction to review this. The Ninth Circuit issued its judgment on August 26, 1991. A. 38. Erwin & Erwin did not request a rehearing from that decision, and its petition for certiorari is untimely. Rule 13.4 of the Rules of the Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

CHARLES ROBINOWITZ
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re MARQUAM INVESTMENT CORP., Debtor.	Civil No. 88-0915-PA Bankruptcy No. 383-01488-H11
SUSAN BREWER, Objector/Appellant, v. ERWIN & ERWIN, P.C., Creditor/Respondent.	**OPINION** (Filed March 8, 1990)

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REDDEN, J.

Suzan Brewer (Brewer) appeals the bankruptcy court's orders allowing the unsecured claim of Erwin & Erwin, P.C. (Erwin & Erwin), for $120,000 attorney's fees, against debtor Marquam Investment Corp. (Marquam). I reverse the bankruptcy court and remand for entry of an order disallowing Erwin & Erwin's claim in its entirety.

BANKRUPTCY

I. Procedural Background

This dispute over Erwin & Erwin's claim for attorney's fees is the most recent skirmish in a war between Brewer and Marquam, Brewer's former landlord, that began in 1976. *See, e.g., Brewer v. Erwin*, 287 Or. 435, 437 & n.1, 600 P.2d 398 (1979) (*Brewer I*) ("[t]he present appeal is one phase of a landlord-tenant dispute to which the parties have devoted an extraordinary amount of their time and efforts"); *Brewer v. Erwin*, 61 Or. App. 642, 644, 658 P.2d 1180 (*Brewer II*) ("This ought to be the final round in a protracted course of litigation between these parties who once, though it seems unbelievable now, enjoyed an amicable landlord-tenant relationship."), *review denied*, 294 Or. 792, 662 P.2d 728 (1983). In 1980, Brewer won a $97,880 state court judgment against Marquam on tort and statutory claims. The judgment became final in 1983, and Marquam petitioned for bankruptcy shortly thereafter.

Brewer filed an unsecured claim for $75,000 in punitive damages against Marquam's estate. Erwin & Erwin filed an unsecured claim for $120,000 in attorney's fees. In 1988, the bankruptcy court confirmed Marquam's chapter 11 plan, allowing Erwin & Erwin's claim and effectively obliterating Brewer's claim for punitive damages. Brewer appeals the allowance of Erwin & Erwin's claim.

II. The Brewer-Marquam Tort Litigation

Warde Erwin, Marquam's president, owns about 60% of Marquam's stock. LaVelle Mullennex, Warde Erwin's legal secretary for more than twenty years, owns the remaining 40% of Marquam. Warde Erwin and his son, Charles Erwin, are attorneys and shareholders in the professional corporation of Erwin & Erwin. (Although the professional corporation was formerly known as Erwin, Lamb & Erwin, I will refer to it throughout this opinion as Erwin & Erwin.) When Marquam filed its chapter 11 petition in 1983, it listed Charles Erwin as a director and vice president of Marquam, although he apparently is no longer a Marquam officer. Charles Erwin was responsible for most of the legal services included in Erwin & Erwin's claim. Lawrence Erwin, another son of Warde Erwin, represents Marquam in the bankruptcy proceedings.

Brewer rented the second story of an old house from Marquam. In about 1975, Marquam decided to demolish the house. Marquam sent Brewer an eviction notice, but Brewer was reluctant to leave. "She became interested in a group which sought to prevent the demolition of old houses in the neighborhood and attended one or two of the group's meetings." *Brewer I*, 287 Or. at 437.

When Brewer did not leave voluntarily, Mullennex and Warde Erwin became impatient. They repeatedly threatened, menaced, and harassed Brewer and her friends. *See id.*, 287 Or. at 458-60. Marquam partially demolished the lower floor of the house while Brewer was still a tenant. There was evidence that Warde Erwin struck Brewer in the face. *Id.* at 459; *Brewer II*, 61 Or. App. at 645.

At trial in September 1977, the court granted motions for involuntary nonsuit and for directed verdicts on Brewer's claims for intentional infliction of emotional distress. Erwin & Erwin represented Marquam. Brewer won $650 general damages on her battery claim against Warde Erwin and Marquam.

On September 25, 1979, the Oregon Supreme Court reversed the trial court's dismissals of Brewer's intentional infliction of emotional distress claims and remanded for a new trial. *Brewer I.* In March 1980, the second trial ended in mistrial. At the third trial in June 1980, the jury found that Marquam, Mullennex, and Warde Erwin had intentionally inflicted severe emotional distress on Brewer. *Brewer II.* Brewer was awarded $20,000 general damages against Warde Erwin, Mullennex, and Marquam; $75,000 punitive damages against Marquam only; $2,880 for violation of the Oregon Residential Landlord and Tenant Act, ORS 91.700-.895; and attorney's fees. *Id.*

On February 16, 1983, the Oregon Court of Appeals reversed the trial court's grant of a new trial and remanded for reinstatement of the jury verdict against Warde Erwin, Mullennex, and Marquam. *Brewer II,* 61 Or. App. 642. On April 26, 1983, the Oregon Supreme Court denied Marquam's petition for review. 294 Or. 792. On May 4, 1983, Marquam filed for bankruptcy.

III. Bankruptcy Proceedings

Marquam's bankruptcy petition valued its total assets at $107,152.54. Marquam listed a $120,000

unsecured debt to Erwin & Erwin "[f]or attorneys' fees rendered staring [sic] in April of 1976 to date for defense and services in various lawsuits entailed in representation of Marquam." Appellant's E.R. at 5.

On May 6, 1985, the bankruptcy court completed hearings on whether Erwin & Erwin intended that its legal work be compensated by Marquam. The court stated that

> neither Charles Erwin nor Mr. Lamb, who are members of the professional corporation, were not stockholders or officers of Marquam and therefore would not derive any benefit from any increase in the assets held by Marquam. The fact that Mr. Erwin spent a great deal of his time over a period of several years devoted to the legal problems of Marquam doesn't seem reasonable to the Court that Mr. Erwin would do that – would merely contribute his services without compensation when he is not – has no relationship or no ownership interest in Marquam.
>
> Mr. Erwin testified that during a part of that period his income was so low that he was required to borrow funds. That doesn't seem to indicate that – he wouldn't be donating services to a corporation in which he had no financial interest.

Appellant's E.R. at 20-21. The court also stated that

> it appears that there would have been no good purpose served, necessarily, in the professional corporation submitting a bill to Marquam when it was known that Marquam had no funds from which those services could be paid, and submitting such a bill would have just been an effort in

> futility. Whether or not the attorney fees were mentioned or an account for attorney fees were mentioned in those two lawsuits were a matter of tactical trial tactics and not necessarily evidence that there was no such agreement that the legal services would be compensated.

Id. 21. The court was

> convinced that the evidence shows that the services performed by the professional corporation were not intended to be donated to Marquam but were intended that they would be paid by Marquam when funds were available by Marquam to make payment of those fees, and, therefore, the Court finds that the claim for attorney fees is a valid claim, and the only question then remaining is whether or not the doctrine of equitable subordination will apply to the claim and whether or not the amount of the claim is reasonable.

Id. at 22-23.

On March 25, 1988, the bankruptcy court confirmed Marquam's chapter 11 plan. *Id.* at 88. The court allowed Erwin & Erwin's claim for $120,000 attorney's fees.

IV. Marquam's Attempts to Evade Brewer's Claim

Two courts have found that Marquam improperly attempted to evade Brewer's claim against it.

A. Marquam's Transfer to Squaw Creek

Under a joint venture agreement executed May 9, 1980, the Warde H. Erwin Trust (Trust) and Paul Martin,

an architect, agreed to build and sell condominiums on Marquam's vacant lots. The ill-fated development was to be called Inner City Village. The Trust agreement, which was not recorded, apparently established Lawrence Erwin, Charles Erwin, and LaVelle Mullennex as trustees.

On June 20, 1980, the jury returned its verdict for Brewer against Marquam. On June 23, 1980, Marquam transferred its vacant lots to Squaw Creek Construction Co. (Squaw Creek), a corporation owned by Warde Erwin that had no other assets. In return, Marquam received a promise that Squaw Creek would pay for the land if and when Inner City Village was built and sold. If the condominiums were not built, Marquam would get the land back in two or three years.

Although Squaw Creek was to pay Marquam for the vacant lots, the joint venture agreement provided that the Trust, not Squaw Creek, would be paid for the vacant lots from the proceeds of condominium sales. The joint venture agreement did not require that the Trust pay Squaw Creek for the vacant lots, although it did provide that Squaw Creek would transfer the vacant lots to the joint venture when needed for development.

In August 1980, the Portland Historical Landmark Commission approved the joint venture's plans for Inner City Village, subject to seven conditions. Warde Erwin objected to those conditions. On September 4, 1980, the Portland City Council denied Warde Erwin's appeal. There is no evidence that the plans for Inner City Village were revised to meet the Landmark Commission's seven conditions.

Mullennex and Charles Erwin testified at trial that several banks made oral commitments to finance Inner City Village. 2 Respondent's E.R. at 96, 103. These alleged oral commitments were never consummated. In early 1982, Martin sought financing. On January 28, 1982, a bank offered to lend money to the joint venture at 21% percent interest. This attractive offer expired on February 24, 1982.

In January 1982, Brewer filed an action in Multnomah County Circuit Court claiming that Marquam had fraudulently transferred its vacant lots to Squaw Creek. At the trial, Marquam contended that the equity in its office building could satisfy Brewer's possible judgment against it. Charles Erwin, Marquam's attorney, did not inform the court that the office building was encumbered by the long-term lease to Erwin & Erwin, or that Erwin & Erwin had an outstanding claim against Marquam for attorney's fees.

The Multnomah County Circuit Court set aside the transfer. It stated:

> Here you have evidence that the assets left in Marquam amount to some one hundred and sixteen thousand eight hundred, if I understand it correctly, and that's offset somewhat by a mortgage that exists, which would bring it down somewhere near $100,000.
>
> [I]t clearly appears that potentially [Brewer's] claim could be in excess of the assets Marquam has left. . . .

Appellant's E.R. at 63-64 (transcript of April 12, 1982 hearing). The court found that Marquam originally intended to develop Inner City Village, and that the

transfer to Squaw Creek was tacked on later to avoid Brewer's claims. The court rejected Charles Erwin's explanation for the transfer: "I think that explanation is more of an afterthought in justifying what was done rather than the reason for what was done." *Id.* at 66. The court concluded that Marquam intended to hinder and delay Brewer, although the court "avoid[ed] using the word 'defrauding' " regarding Marquam's conduct. *Id.* Marquam did not appeal.

B. The Lease Between Marquam and Erwin & Erwin

In 1979, Marquam renewed its lease agreement with Erwin & Erwin. The lease provided that Erwin & Erwin would pay $750 per month rent for 3,202 square feet of office space and a storage basement. The lease required that Erwin & Erwin pay utilities, liability insurance, and maintenance, while Marquam would pay property taxes and fire insurance.

During the bankruptcy proceedings, Brewer and the trustee challenged the lease, arguing that it was a fraud on Marquam's creditors. The bankruptcy court found that the trustee had not met its initial burden of showing badges of fraud. On appeal, Judge Malcolm F. Marsh reversed, concluding that the lease was a fraudulent transfer. *John B. Franzwa, Inc. v. Erwin & Erwin, P.C. (In re Marquam Investment Corp.)*, No. 88-114-MA, slip op. at 2 (D. Or. June 13, 1988), *quoted in* Appellant's E.R. at 76-87.

Judge Marsh found that the lease agreement between Marquam and Erwin & Erwin bore many badges of fraud. Marquam executed the lease in anticipation of its continued litigation against Brewer. The lease left Marquam

insolvent by encumbering its office building, the only remaining valuable asset after the transfer of the vacant lots to Squaw Creek. Neither party to the lease agreement bothered to observe its terms. Erwin & Erwin paid fire insurance premiums and taxes while Marquam paid for utilities. The parties failed to disclose the lease during the Squaw Creek litigation.

Erwin & Erwin paid rent at less than half the market value. Judge Marsh found that "[t]he relationship of [Marquam and Erwin & Erwin] is so close and intertwined that the transaction was clearly not at arm's length." Appellant's E.R. at 83.

STANDARD OF REVIEW

I. District Court Review

The district court acts as an appellate court when it reviews a bankruptcy court judgment. *Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.)*, 819 F.2d 914, 918 (9th Cir. 1987). The district court reviews findings of fact for clear error and reviews conclusions of law de novo. *Id.*

A finding is "clearly erroneous" when the reviewing court on the entire evidence is "left with the definite and firm conviction that a mistake has been committed," even though there is evidence to support the finding. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Even when the trial court's findings are based on the credibility of witnesses, the reviewing court may find clear error because demeanor and inflection are not the only factors that affect the decision to believe a witness.

Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985). "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Id.*

II. Statutory Standard and Burden of Proof

The court should disallow a claim by "an insider or attorney of the debtor" to the extent that the claim "exceeds the reasonable value of such services." 11 U.S.C. § 502(b)(4) Section 502(b)(4) was intended to prevent "overreaching by the debtor's attorneys and concealing of assets by debtors." S. Rep. No. 95-989, 95th Cong. 2d Sess. 68, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5849.

The insider or attorney creditor must adequately support a claim against the debtor's estate. *In re All-American Auxiliary Ass'n*, 95 Bankr. 540, 545 (Bankr. S.D. Ohio 1989). If the insider or attorney creditor is able to support the claim, the objecting party must point to facts tending to defeat the claim. *Id.* If the objector does introduce such facts, the creditor must prove the validity of the claim by a preponderance of the evidence. *Id.*

Erwin & Erwin argues that Brewer must show by clear and convincing evidence that Erwin & Erwin intended to donate legal services to Marquam. Assuming that Erwin & Erwin has adequately documented its claim, Brewer has successfully cast doubt on Erwin & Erwin's claim. The burden shifts to Erwin & Erwin. *See All-American Auxiliary*, 95 Bankr. at 545. Gift law is irrelevant.

DISCUSSION

I must reverse the orders allowing Erwin & Erwin's claim for attorney's fees. Erwin & Erwin did not adequately support its claim. Even if it had, Erwin & Erwin did not show the validity of its claim by a preponderance of the evidence.

The bankruptcy court's rulings are certainly understandable because of the protracted hearings on this claim and the acrimonious and unhelpful presentation by the attorneys. Although the bankruptcy court held evidentiary hearings in 1985, it did not have the opportunity to consider later developments, such as Erwin & Erwin's withdrawal of its allegation that Marquam paid fees through a rental set-off. In addition, this case seems to have become a personal feud among counsel and parties. In the briefs before this court, neither attorney cited the relevant legal standards. Erwin & Erwin focused on Oregon gift law while Brewer cited decisions on equitable subordination.

I. Erwin & Erwin Is an Insider

Erwin & Erwin argues "[t]here are no claims of 'insiders.' " Respondent's Brief at 12. I disagree.

Under the Bankruptcy Code, an "insider" includes a "relative of a . . . director, officer or person in control of the debtor." 11 U.S.C. § 101(30)(B)(vi). However, I need not resort to the Bankruptcy Code to realize that both current shareholders in Erwin & Erwin are insiders of Marquam. Warde Erwin is Marquam's president, and Charles Erwin is Warde Erwin's son. Marquam's 1983

bankruptcy petition lists Charles Erwin as Marquam's vice-president and director. *See* Appellant's E.R. at 4. Marquam's secretary and 40% shareholder, LaVelle Mullennex, has been Erwin & Erwin's legal secretary for many years.

Erwin's direct examination of Mullennex at trial on this claim revealed Erwin & Erwin's entanglement with Marquam:

> Q: Tell the Judge how it is – what mechanics you would go through to send the bill [for legal services] to Marquam.
>
> A: From Erwin & Erwin?
>
> Q: Yes, ma'am.
>
> A: Well, I suppose I would sit down and add up the timesheets for some particular time and then type that out and probably hand it to somebody or put it in a file. . . . I did not do that.
>
> Q: You mean you would have to type up a bill and present it to yourself?
>
> A: That's correct.
>
> Q: [D]id it ever occur to you to send yourself a bill?
>
> A: No, unfortunately probably it didn't.

2 Respondent's E.R. at 54-55. Charles Erwin apparently elicited this testimony to show that it would have been pointless for Erwin & Erwin to send a bill to Marquam for legal fees. However, Mullennex's testimony shows that Marquam and Erwin & Erwin are so intertwined that they cannot be considered separate entities.

II. Erwin & Erwin's Claim

A. The Rental Set-Off

Erwin & Erwin originally claimed that it collected attorney's fees from Marquam through a monthly rent set-off of $184.22 starting in 1976, for a total of $15,658.70. Charles Erwin testified that the setoff was "the only compensation this law firm – me – received during this time."

2 Respondent's E.R. at 106. he also testified that "I received some compensation in the form of rental, but only to the extent of $184 a month." *Id.* at 107.

The set-off has no basis in reality. Erwin & Erwin had never billed Marquam for the set-off and Marquam never listed it as a monthly expense. In fact, Erwin & Erwin was making Marquam's monthly mortgage payments and claiming the difference between the mortgage and rent payments as a set-off. In Erwin & Erwin's revised 1986 claim, the $15,658.70 attorney's fees set-off disappeared. It reappeared as a $13,056.73 set-off for utility bills that Erwin & Erwin had paid.

The set-off episode shows that Erwin & Erwin's claim was at best an afterthought. Charles Erwin has not explained the set-off's magical transformation from attorney's fees to utility bills.

B. Services for Inner City Village

The set-off is not the only example of Erwin & Erwin's flexible fee claim. In 1983, the claim included

$34,400 in attorney's fees for "[p]reparation of all documents for unit ownership development [i.e., Inner City Village], associated hearings and conferences, design review – City Council." To support this claim, Charles Erwin testified as follows:

> Q: Can we agree that the work on the condominium project was going to be free; that there were no legal fees going to be incurred on that?
>
> A: No, we cannot agree to any such nonsense.

2 Respondent's E.R. at 132.

Despite Charles Erwin testimony, the joint venture agreement provided that Erwin & Erwin's services "are to be noncompensated professional services and shall be considered as and when made a noncompensated contribution to the joint venture." Appellant's E.R. at 106. In 1986, Erwin & Erwin dropped its claim for legal work on the Inner City Village project.

C. Erwin & Erwin's Failure to Bill Marquam

Erwin & Erwin never billed Marquam for legal fees. The parties presented expert testimony on this issue. Richard Solomon, plaintiff's accounting expert, testified that Erwin & Erwin should have sent regular itemized bills to Marquam to show that the parties' transactions were at arms-length.

1 Respondent's E.R. at 194-98.

According to Erwin & Erwin, its expert, Roy Griffin, testified " '[t]hat his experience, in similar client professional relationships, is that billings are sent at the conclusion of lengthy jobs.' " Respondent's Brief at 7. Despite

Erwin & Erwin's quotation marks, the statement is not verbatim and in fact distorts Griffin's testimony. Griffin testified that "when a person performs a service, somewhere along the line he sends progress billings, or waits until the project is completed and sends a billing for the amount of his services; that's normal procedure." 2 Respondent's E.R. at 219. When asked about insolvent clients, Griffin stated "[n]ormally I would expect billings to be done, but it would not be unusual in situations where there are no funds available that the billing might be held up and delayed until funds were available." *Id.*

According to Griffin, Erwin & Erwin should have billed Marquam either periodically or at the completion of a project. Erwin & Erwin did neither. By 1980, Erwin & Erwin had completed projects on which it had logged hundreds of billable hours. Erwin & Erwin sent no bills on any completed projects.

Griffin did testify that a service provider might delay billing an insolvent client until funds were available. However, Erwin & Erwin did not just delay billing, it never billed. If Marquam was insolvent, then it is hard to understand why Erwin & Erwin continued to represent it for so many years.

Erwin & Erwin cites Mullennex's testimony that legal fees were

> probably discussed every other day or so . . . because we meet and have coffee in the morning, and when this litigation was going on there was so much to do every day that everybody was beginning to get a little upset about the fact that it was taking so much time, and

> how were we going to be paying the Erwin & Erwin bills.

2 Respondent's E.R. at 79. Such testimony shows only the incestuous relationship between Marquam and Erwin & Erwin. It does not show that Erwin & Erwin expected to be paid for its legal services.

D. Erwin & Erwin's Time Records

Despite its failure to bill Marquam, Erwin & Erwin asserts that "this claimant kept regular time records contemporaneously with all work performed, not just some of it." Respondent's Brief at 14. Erwin & Erwin may have kept regular time records for all the work it performed. However, its claim does not reflect such records. In its 1983 claim, Erwin & Erwin cited no time slips. In its amended 1986 claim, it cited time slips, but they did not account for all the hours claimed.

For example, in the 1982 action to set aside the Squaw Valley transfer, Erwin & Erwin's time slips account for 19.75 hours, while Erwin & Erwin's reconstruction of time spent is 70 hours. *Id.* at 11. In one landlord-tenant action, Erwin & Erwin's time slips account for 179.25 hours, while Erwin & Erwin's reconstruction of time spent is 445.25 hours. *Id.* In another case, Erwin & Erwin originally estimated 50 hours, reconstructed 20 hours, and cited no time slips at all.

In another example of Erwin & Erwin's flexible attorney's fees, in 1983 Marquam brought action against Aetna Insurance Co. (Aetna), claiming that it had incurred $120,000 in legal fees during its tort litigation against Brewer. (Marquam claimed that Aetna refused to settle

even though Brewer would have accepted $7,500.) Appellant's E.R. at 72. However, in its 1983 petition, Erwin & Erwin claimed about $25,600 for the same services.

Erwin & Erwin had reasons for keeping time slips other than collecting fees from Marquam. In Marquam's many landlord-tenant actions, Marquam hoped to extract attorney's fees from its tenants if it prevailed.

E. Failure to Disclose the Claim for Attorney's Fees

Marquam did not disclose Erwin & Erwin's claim for legal fees during the 1980 trial on Brewer's emotional distress claim, or the 1982 trial on the Squaw Creek transfer. Mullennex explained that Marquam did not report its liability to Erwin & Erwin because Marquam is a cash-basis taxpayer.

2 Respondent's E.R. at 93.

The claim for attorney's fees was relevant in both cases in which Marquam failed to disclose it. In the Brewer tort claim trial, Erwin & Erwin's claim for attorney's fees would have reduced Marquam's net worth, diminishing its potential liability for punitive damages.

In the Squaw Creek transfer litigation, the claim for attorney's fees would have further discredited Marquam's argument that it had sufficient assets to pay Brewer's judgment against it. Charles Erwin now states that he did not disclose the fees because "[n]o stipulation was sought nor received, nor did Brewer inquire on the subject of creditors other than herself." That explanation does not seem adequate, because Marquam's net worth was one of the key issues in the case. If Erwin & Erwin's

claim was bona fide, it should have been disclosed to the court.

Erwin & Erwin argues that it did disclose its claim several times. However, Erwin & Erwin's claims for attorney's fees against Marquam seem to have surfaced when the fees would be paid by a third party. Erwin & Erwin also argues that Brewer was aware of the claim and could have brought it up in the two actions. Brewer is not responsible for raising a claim whose full extent was known only to Erwin & Erwin and Marquam.

F. Erwin & Erwin's Profit Motive

Erwin & Erwin argues that it never intended to donate its legal work to Marquam without pay. Charles Erwin asserts that he "had to borrow significant funds just to pay bills." Respondent's Brief at 11. He states that his income between 1978 and 1982 ranged from $15,000 to $31,000. Even if these allegations were documented, they would not show that Erwin & Erwin intended to collect fees from Marquam.

This argument is similar to one rejected by the court in *All-American Auxiliary*, 95 Bankr. 540 (Bankr. S.D. Ohio 1989), where the claimant sought unpaid salary from the debtor. That claimant had no documentation of his claim. Erwin & Erwin's claim should also be rejected as without documentation.

Erwin & Erwin has donated services to Marquam. It claims no fees for representing Marquam in *Marquam Inv. Corp. v. Beers*, 47 Or. App. 711, 731, 615 P.2d 1064, *review denied*, 290 Or. 249 (1980). In at least two other cases,

Erwin & Erwin claimed no fees for representing Marquam. *See Brewer I*, 287 Or. at 437 n.1 (citing *Marquam Inv. Corp. v. Casciato*, No. 77-370 (D. Or. Aug. 10, 1977); *Marquam Inv. Corp. v. Bonyhadi*, No. A7803-03571 (Multnomah County Circuit Court)).

Erwin & Erwin also argues that Charles Lamb would not have donated his time to Marquam. However, no documents show an agreement between Lamb and Erwin & Erwin regarding Lamb's compensation after leaving Erwin & Erwin.

G. The Inner City Village Project

Erwin & Erwin contends it expected that Marquam would pay it from the proceeds from the Inner City Village condominium project. Although this once was a realistic expectation, Marquam's transfer to Squaw Creek in 1980 made payment from this source unlikely.

Marquam transferred its vacant lots to Squaw Creek in return for a promise that Squaw Creek would pay Marquam for the land when and if the condominiums sold. If the condominiums were not built, the land could be tied up for two to three years before Marquam could recover it. During those years, a creditor of Squaw Valley could levy against the property and cut off Marquam's rights.

In addition, the Trust and Martin could agree between themselves to reduce the price paid for Marquam's land without consulting Marquam. Even if Marquam were paid for the land, it would receive at most

$150,000, only $30,000 more than the attorney's fees supposedly due Erwin & Erwin. To collect its fees, Erwin & Erwin would have been required to render its client insolvent.

Erwin & Erwin now contends that "Marquam retained improved and [sic] realty and land of a value equivilent [sic] to pay its creditors, in addition to the land which it committed to the development project." Respondent's Brief at 9. This assertion directly contradicts the Multnomah County Circuit Court's finding that "the assets that are left with Marquam are inadequate." Appellant's E.R. at 65. Erwin & Erwin could have disputed the court's findings on direct appeal. It is too late to do so now.

CONCLUSION

The bankruptcy court's orders allowing Erwin & Erwin's claim for attorney's fees are reversed. The case is remanded to the bankruptcy court for the entry of an order disallowing Erwin & Erwin's claim for attorney's fees in its entirety.

DATED this 8 day of March, 1990.

/s/ James A. Redden
JAMES A. REDDEN
United States
District Judge

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

Number 92668

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1992

ERWIN & ERWIN,

Petitioner,

vs.

SUZAN BREWER,

Respondent

On Petition for Writ of Certiorari
To The United States Court of
Appeals for the Ninth Circuit

MOTION TO STRIKE

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MOTION TO STRIKE

Comes now petitioner and moves to strike the proposed "Lodgings" submitted by Charles Robinowitz in behalf of respondent, Suzan Brewer, as follows:

VIOLATION OF RULES:

The filing does not designate on the cover an "Attorney of Record" who is admitted to the Bar of the Supreme Court in violation of Rules (9) and 33 (2), Rules of the Supreme Court.

Charles Robinowitz may not be admitted to the Bar of the Supreme Court of the United States of America (Supreme Court Rules 9, 33 (2).

The size of the enclosures and attachments do not conform to Rule 33 (1) (d) of the Rules of the Supreme Court in that they are all 8 1/2 x 11 inches instead of the required 6 1/8 x 9 1/4 inches.

ON THE MERITS

The proposed appearance in behalf of Suzan Brewer attempts to insert in the record a totally uncertified and only selected portion of matters not ever seen by the United States District Court for the District of Oregon nor by the Ninth Circuit Court of Appeals.

This tactic is the exact same tactic employed illegally (unfortunately successfully) in the Brewer appeal to the United States District Court for the District of Oregon and adopted by the Ninth Circuit Court of Appeals in its de novo approach.

No item included in the proposed "Lodgings" was included in Brewer's designation of record to the District Court of Oregon and therefore was not included in the record submitted to the Court of Appeals by the U. S. District

Court Clerk (see transmittal of record petitioner's appendix page 190-197).

SUGGESTION FOR SANCTION

Rule 33 (7) of Rules of the Supreme Court of the United States of America provide that the Supreme Court may levy sanction against lawyers improperly using the court's process to cause additional expense to the opposition or to the court when made with knowing and intentional violation of Rule 33. It would appear that it would be proper to levy such a sanction against counsel for Suzan Brewer.

Mr. Robinowitz has continuously sought to harrass petitioner and abuse the process of the Rules of Court and the legislative requirements applicable to appeals.

Suggestions for sanctions are made as appropriate to the facts disclosed by

the documents entitled "Lodgings" submitted by Charles Robinowitz.

The documents entitled "Lodgings" are:

1. One page of debtor's statement of affairs in the bankruptcy court;

2. Copy of Suzan Brewer's objection to Proof of Claim;

3. Copy of Brewer's second amended objection to proof of claim;

4. Copy of one page (page five) of Marquam Investment's bankruptcy Schedule A-3;

5. Copy of one page (page six) of Marquam Investment's bankruptcy Schedule B-1. (Real property);

6. Copy of one page (page seven) of Marquam Investment's bankruptcy Schedule B-2 (Personal property);

7. Copy of Page eight of Exhibit A. The exhibit was a summary of time involved in services provided by Erwin &

Erwin to the debtor, Marquam Investment Corporation;

8. Copy of pages 10 and 11, entitled "Summary of Matters and setoff of lease payments."

(Note: The "index" accompanying the so-called "Lodgings" says this item (8) represents a copy of page 59 of Exhibit A Supplemental.) (This is the concluding summary page of a 59-page exhibit which the Ninth Circuit stated was nonexistent but which Brewer now tenders to the court as a "Lodging."

OBSERVATIONS

Rule 33 (7) of the Rules of the Supreme Court of the United States direct that the Clerk of that court shall not accept or file any document which does not conform to the rules.

Petitioner assumes therefore that the so-called "Lodgings" will not be accepted nor filed in case number 92-668

and the foregoing may be of no assistance and may be disregarded. However, insofar as consideration of "sanctions" is concerned, the following observations may be of some assistance:

1. As to all eight items:

a) None are properly identified as to where they appear in the record before either the U. S. District Court for the District of Oregon, nor in the record before the Ninth Circuit Court of Appeals. They do not appear in either.

b) None have any relevance to the matters raised in the petition for certiorari nor as proof of any fact of which petitioner has not already advised this court by its petition, appendix and submittals.

c) Item seven above was an attachment to the proof of claim of Erwin & Erwin (bankruptcy transcript, May 6, 1985, p. 56 through 63, as being

supported by time slips, testimony of L. Mullennex, Secretary). It was prepared in accordance with the direction of Bankruptcy Judge Johnson and was admitted as exhibit, page 115. Mr. Robinowitz specifically waived objection. It was not ever seen nor examined by either the United States District Court for the District of Oregon nor was it ever seen by the Ninth Circuit Court of Appeals although discussed in the transcript (Petitioner's appendix, Transmittal of record, p. 190-195).

d) Item eight above is a portion of an exhibit prepared some two years later as ordered by bankruptcy judge Hess for the purposes of establishing reasonable value of services performed by Erwin & Erwin, in behalf of the debtor.

This item likewise was not designated by Brewer as an item of designated record on her appeal to the

United States District Court for Oregon, and therefore, was not included in the record submitted by the Clerk of that court to the Ninth Circuit Court of Appeals and therefore could not have been considered by that appellate court.

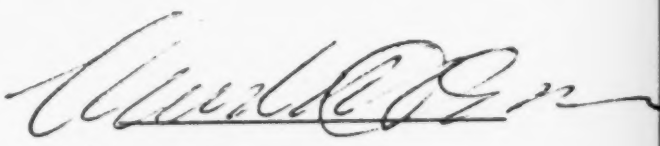
This document totalled some 59 pages and was never seen by either appellate court. The Ninth Circuit Court of Appeals held that this exhibit did not exist. It not only existed but was compelling as being conclusive as to the extent and nature of service provided. It was unimpeached.

The reason for its inclusion as a proposed "Lodging" by the attorney for Suzan Brewer is without explanation as to possible relevance.

It is apparently an ill-concealed attempt to:

1. Make an unauthorized appearance by an unadmitted attorney as counsel in the Supreme Court or

2. Insert in the record as though having been considered by the appellate courts, matters which were never designated as a part of the appellate record and were never considered by either appellate court and hence matters known and intended by the offeror to be equally illegal when offered to the Supreme Court of the United States of America.



Warde H. Erwin
Of counsel of Record
for Petitioner

Supreme Court, U.S.
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Number 92668

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
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Petitioner,

vs.

SUZAN BREWER,

Respondent

On Petition for Writ of Certiorari
To The United States Court of
Appeals for the Ninth Circuit

REPLY BRIEF IN ANSWER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner by way of Reply to Brief in opposition to petition for Writ of Certiorari responds:

CORRECTION:

In the opposition brief, page one "Statement of the Case," it is stated:

> "Erwin & Erwin's statement of the case incorrectly states Brewer did not appeal the reasonable value of its services. Petition for Cert. p. 18. This is wrong; she challenged the entire claim. Lod p. 2-4."

That statement is false.

Lod (presumably "Lodging") 2-4 is moved against to be stricken as not stating where it appears in the record of either appellant court (U. S. District of Oregon or Ninth Circuit Court of Appeals). It appears in neither.

The reason it does not appear in either record is that it remains in and has never left the files of the U. S. Bankruptcy court of the State of Oregon. No appellate judge has ever seen it and therefore could not have relied upon it.

The heading of the two proposed Lodgings is the same:

"UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON."

The statement on page 18 of petitioner's brief is precisely accurate and is repeated: It states:

"The 'reasonable' value of services was not appealed."

The District Court excised the bankruptcy court record on appeal to that court as to "reasonableness" on motion of Brewer (Pet p. 17-18).

RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

This rule requires that a brief in opposition to a petition for Writ of Certiorari should contain arguments:

> ". . .for denying the petition and address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted."

No misstatements of fact or law contained in the petition are addressed in the brief in opposition other than the fact noted above which was apparently deliberately, erroneously, or perhaps intentionally misleading.

We will briefly examine the elements upon which petitioner claims that the Writ should be granted pointing out that nothing appears in the opposition's brief which takes issue with any contention in support of the writ.

ARGUMENT

1. THE CONTENTION:

The petition first contends that Fed. R. of App. P. 38 is not applicable because the rule does not apply to "appellants" as realligned by the court. The rule only applies to "appellees." Brewer was the appellant as realligned by the court. (Pet p. 25-28)

The RESPONSE:

The brief in opposition does not take issue with that contention either as to the court's reallignment or as to the language, intent, or purpose of Rule 38 as applied to the levy of the sanction by order of the Ninth Circuit Court of Appeals order of March 24, 1993.

2. The CONTENTION:

The petition next contends that Fed. R. App. P. 38 has no application to a motion to recall the mandate under Fed. R. Civ. P. 60 for a demonstrated mistake

which was that the Ninth Circuit held a de novo bankruptcy trial under the mistaken belief that it was doing so on the record in the bankruptcy court. (Pet. p. 28 et seq.)

The contention further is that Fed. R. App. P. 38 permits sanctions by way of "damages" to an appellee for a frivolous appeal or double or single costs (Pet. p. 31). No other sanction is permitted, and a $2500 sanction relates to nothing.

The RESPONSE

The brief in opposition does not take issue with the contention either as to the applicability of Fed. R. App. P. 38 or to Fed. R. Civ. P. 60 motion or as to the error of the court.

3. The CONTENTION:

The petitioner next contends that Fed. R. App. P. 38 applies only to frivolous appeals and that petitioner's

appeal was not "frivolous as either a matter of law or fact." (Pet. p. 33)

The RESPONSE:

The brief in opposition does not address the question of whether or not the appeal was frivolous.

In fact, the brief in opposition agrees that the sanction of March 24, 1992, was based solely on the bankruptcy court's factual determination decision allowing the claim of Erwin & Erwin P. C. and not on the appeal.

> "Because the claim of Erwin & Erwin was so absurd and implausible that it should not have appealed its its denial to that court." (Ninth Circuit) (Br. Opp. p. 4)

Judge Alarcon's dissent is not even mentioned in the brief in opposition.

Judge Alarcon's statement was: (Pet. Ap. p. 68)

> "Punishment of a party that prevailed in the trial court under Rule 38 for seeking to uphold a favorable judgment appears to be a bizarre application of a rule designed to discourage frivolous appeals by the party that lost in the trial court."

It is not challenged in the brief in opposition.

It would have been even more bizarre if it had been known that it was the Ninth Circuit panel itself which failed to discover that it was relying on a record which it never examined and which it erroneously stated was nonexistent.

The brief in opposition does not take issue with the contention that this is a matter of first impression. (Pet p. 66)

4. The CONTENTION:

It was error for the Ninth Circuit panel to consider that "de novo" meant that the Court of Appeals was required to consider the entire bankruptcy proceeding de novo. (Pet. p. 69)

"De Novo" consideration is de novo on the record made in the lower court and not a record made in some other court. It is the decision of the District Court based upon the record before it that the Ninth Circuit must consider de novo on appeal and not the decision of the bankruptcy or some other court whose record is not before it.

Br. 8013 requires affirmance of disputed factual questions on appeal.

The RESPONSE:

The brief in opposition does not address the contention.

The objection is meritless.

5. The CONTENTION:

Petitioner contends next that the Court of Appeals failed to follow its own rules on en banc consideration by the Ninth Circuit Court of Appeals of petitioners' motion for reconsideration of the panel's decision of March 24, 1992, awarding sanction of $5058. and for failing to allow en banc consideration of the Fed. R. Civ. P. 60, review of the decision of August 26, 1991, and awarding an additional sanction of $2500. (Pet. p. 54).

The RESPONSE:

The brief in response does not address this issue in any manner.

6. The CONTENTION:

The petitioner contends that to levy a devastating sanction unauthorized by any definitive standard without notice or hearing violates provisions of

the Fifth and 14th Amendments to the UNITED STATES OF AMERICAN CONSTITUTION. (Pet. p. 62)

The RESPONSE:

The contention is not addressed as to either fact or law.

7. The CONTENTION:

Petitioner contends next that both the District Court and the Court of Appeals failed to consider, recognize, or apply the provision of 11 U.S.C 502 (b) (4) (Pet. App. 270) which mandates allowance of an "insider" or "attorney for the debtor's" fees as a claim in bankruptcy but only as to reasonable value thereof, as distinguished from a contractual consideration (Pet. p. 43).

Of equal importance is the contention that neither appellate court considered the admonition of Bankruptcy Rule 8013 (Pet. p. 43). (See Anderson v. City of Bessemer, Pet. App. 240, 251, 257, 260., 264.) (1985)

The RESPONSE:

The brief in response does not address those contentions in any manner.

CONCLUSION

As demonstrated above, the brief in opposition does not address any contentions made in support of the petition for certiorari.

Petitioner, however, wishes to point out the misstatements made in the opposition brief to illustrate the tactics adopted by Brewer and her attorneys in all phases of this litigation.

Since those misstatements are not responsive to Rule 15 of the Rules of this court in that they have no bearing on any issue which would be before the court if certiorari were granted, yet, the same tactics were successful in the District Court of Oregon and the Ninth Circuit Court of Appeals.

A reading of the statement of the case in the Brief in Opposition will convince the reader that the recitations constitute merely a narrative statement of conclusions and irrelevant matter of the pleader.

There is absolutely nothing in the record of any appellate court to support the recitation of the history of the case as embellished by those recitations.

To illustrate:

The first statement claims that Brewer contested not only the "intent to make a gift" decision of the bankruptcy court, but also "the reasonableness of value of the services rendered by Erwin & Erwin, P.C. to Marquam Investment," and references objections made in the bankruptcy court which are attempted to be filed as "Lodgings" as though binding on appellate courts.

These objections to services found by the bankruptcy court to have been actually performed and reasonable in amount were specifically excised by the District Court on motion of Mr. Robinowitz himself (Pet. p. 17-18).

His so-called "Lodgings" were bankruptcy court documents not designated for inclusion in any record on appeal.

It should not be forgotten that the District Court did not grant any argument on the appeal but adopted a history based upon a multitude of unrelated and inaccurate matters - never having seen the record of any court.

On page two, Br. 2, Mr. Robinowitz states that Brewer objected to the claim based upon a contention that the claim was "fabricated" for the purpose of the bankruptcy and to prevent Brewer from collecting her punitive damages award.

Without any fear of contradiction, petitioner states unequivocally, that no contention of "fabrication" was ever made either in the trial court nor in any appellate court and the so-called Lodgings so illustrate.

How could the Erwin & Erwin claim be "fabricated"? Impossible! - it is admitted in the next preceding sentence that the claim was for services actually performed in defending the Brewer claim and many other legal matters such as work performed for debtor's condominium development.

Did Brewer and Robinowitz think that Marquam would not seriously defend what Marquam felt was a totally illegal claim and based upon false testimony? Whether Erwin Lamb & Erwin, P. C. was counsel, or whether some other legal firm had been selected, Marquam would have

defended, and the costs and attorney fees would have been incurred.

Was Marquam justified in employing counsel to defend against an unjust and improper claim? This claim was tried to a jury; Brewer lost, and appealed to an appellate court, which ordered a new trial on the basis of an heretofore unrecognized theory of intentional infliction of emotional distress. It was set aside by two courts (one on appeal) and the second, by the trial judge before whom the punitive damage award was secured? (See 6 A.L.R.4th 503)

If appellate decisions are to be considered here without any request for judicial notice (See Fed. Rules of Evidence, Rule 201) then this Court should know that Marquam Investment through its attorneys Erwin & Erwin, P. C. filed a Forcible Entry and Detainer action which was postponed by the tactic

of filing by Brewer of some 11 improper answers, all stricken on motion.

When ultimately tried "to a court" as requested by Brewer instead of a jury, the court held in favor of Marquam Investment Corporation and awarded attorney fees.

See the following:

F.E.D. judgment 40 Or. App. 175, 594 P.2d 1327 Marquam Invesment Corporation v. Brewer)

As to services rendered, see the following as a partial example of services performed by Erwin & Erwin, P. C. in behalf of Marquam.

Brewer v. Beers, 280 Or. 251, 570 P.2d 650, Brewer v. Erwin, 287 Or. 435, 600 P.2d 398, 6 A.L.R. 4th 503, 61 Or. App. 642, 658 P.2d 1180 (Rev. Den.) 662 P. 2d

728, 294 Or. 792, Opinion clarified., 70 Or. App. 709, 690 P.2d 1122, (Rev. Den.) 299 Or. 31, 698 P.2d 31, Withdrawn, 299 Or. 118, 698 P.2d 964; Mod. adherred to 75 Or. App. 132, 705 P.2d 242, Rev. Den. 300 Or. 162, 707 P. 2d 584. and Brewer v. Erwin, 61 Or. App. 642, 658 P.2d 1180, Rev. Den. 294 Or. 792, 662 P. 2d 291.

The foregoing do not include services as to other matters where Brewer was not a party and for monetary advances.

Of all of the false and irresponsible statements of counsel for Brewer, none is perhaps more open, nortorious, and blatant than that appearing on page two of the brief in opposition wherein it is stated:

"Brewer objected to this claim contending that Erwin and Erwin fabricated it for the purposes of the

bankruptcy to prevent her from collecting her punitive damage award. " There was no such claim ever made, and none proven or which could even be suspicioned. On page three, it is stated:

"The evidence was overwhelming that the claim was a fabrication by Erwin & Erwin to try to thwart Brewer from collecting her judgment."

When it is admitted the services were performed and were performed in behalf of the debtor in defense of numerous false claims made by plaintiff, it is almost inconceivable that supposedly competent lawyers would attempt to fool the United States Supreme Court by alleging for the first time that the claim of Erwin & Erwin was fabricated.

For Oregon law holding that it would be unconstitutional to prevent a party from obligating itself for legal fees in defense of a claim, see "Submittal B."

page 11 citing the case of Nelson v. Hauser, 278 Or. 571, 577, 565, P.2d 729 (1977) and others.

Let's consider one or two of many examples of trial court untruths:

1. Robinowitz stated to Judge Hess in open bankruptcy court that Erwin & Erwin had created the lease some years after its date and after the bankruptcy was filed, and that he would prove it. After a year's delay in securing an order to withdraw the lease, Mr. Robinowtiz forwarded the document to internationally recognized experts on ink dotting and forgery. The results were, of course, negative and the statements he made were false.

2. Robinowitz stated to Judge Hess that he would prove by a C.P.A. that if the liability of Marquam to Erwin & Erwin was intended, it would appear on the books and financial statements of Marquam

Investment Corporation. His accountant witness testified that accrued liabilities NEVER would appear on the records of a cash-basis taxpayer. Only on books kept on accrual basis would such a liability be shown or accrued. The statement of Robinowitz was false.

The trial of Brewer's claim on remand resulted in a mistrial because her counsel had directed a youthful witness to testify that he did not wish to give his address because this 200-lb witness was afraid of Mr. Erwin (65 years old). Witness and address was listed in tele-one book. Page limits prevent recitation of at least five opprobrious, direct, and false representations made to the trial court of which counsel Robinowitz had not the slightest proof or suspicion. The entire proceedings properly become suspect.

Respectfully submitted,

Warde H. Erwin
Attorney of Record